TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~815.~~ 389 62

THE STEMWINDER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED AUGUST 8, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 815.

THE STEMWINDER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF IDAHO.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	*b*	1
Complaint	1	1
Summons	6	5
Appearance for defendants	8	5
Demurrer to complaint	9	6
Order taking demurrer under advisement	10	6
Order overruling demurrer	10	6
Order granting time to answer	11	7
Answer	12	7
Notice of location of Emma lode	18	11
Order for continuance	21	13
Order beginning trial	21	13
Order continuing trial	23	14
Order continuing trial	24	15
Order continuing trial	25	15
Order continuing trial	26	16
Plaintiff's requests	27	16
Defendants' requests	39	25
Verdict	42	27
Order concluding trial and granting stay	43	28
Judgment	45	28
Certificate to judgment-roll	47	30

JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 21, 1891.

	Original.	Print.
Order granting time to prepare statement on motion for new trial, &c.	48	30
Bill of exceptions (first)	49	30
Plaintiff's instructions given	49	30
Plaintiff's instructions refused	55	34
Defendants' instructions given	62	39
Charge by the court	64	40
Colloquy between court and jury	66	41
Defendants' request given	67	42
Plaintiff's requests refused	67	43
Order granting time to prepare statement on motion for new trial, &c.	70	43
Bill of exceptions (second)	71	44
Testimony of Rees Price	71	44
John King	72	45
Geo. B. McAulay	73	46
Van B. De Lashmutt	74	46
Geo. R. Trask	74	47
Mike Carlin	75	47
Exhibit C—Notice of location of Emma lode	78	40
Testimony of Geo. R. Trask	80	50
Statement on motion for new trial	82	51
Proof of service of statement	82	52
Testimony of Frank C. Loring	85	53
Exhibit B—Plat showing conflicting claims	103a	66
Testimony of X. S. Burke	104	66
Rees Price	120	78
Joseph Cleaver	135	89
John King	143	95
George B. McAulay	151	101
Exhibit F—Notice of location of Stemwinder lode	162	110
G—Amended notice of location of Stemwinder lode	165	112
H—Copy of amended notice of location of Stemwinder lode	166	112
Testimony of Van B. De Lashmutt	169	114
Exhibit L—Affidavit of S. R. Devine, &c.	169	115
Testimony of F. C. Loring (recalled)	172	116
Exhibit J—Plat of Stemwinder Mining Co.'s claim	172a	116
Testimony of John King (recalled)	173	116
J. L. Smith	176	118
Michael Sweeney	177	119
Albert Hagen	180	121
John King (recalled)	185	124
Van B. De Lashmutt (recalled)	188	126
Charles Sweeney	190	127
George R. Trask	191	128
Exhibit C—Map of Emma and Stemwinder lodes	196a	131
Testimony of Michael Carlin	202	136
J. L. Smith (recalled for defendants)	215	146
Exhibit C—Notice of location of Emma lode	220	149
Testimony of Michael Carlin (recalled)	236	160
Geo. R. Trask (recalled)	243	165

	Original.	Print.
Testimony of Dave Wiseman	247	168
Michael Sweeney (recalled for defendants)	249	169
John M. Burke	250	169
Geo. R. Trask (recalled)	252	170
Michael Carlin (recalled)	253	171
Michael Sweeney (recalled)	254	172
Charles Sweeney (recalled)	254	172
X. S. Burke (recalled)	255	172
Plaintiff's requests given	259	175
Plaintiff's requests refused	264	179
Defendants' requests given	271	183
Charge to jury	273	184
Colloquy between court and jury	275	186
Defendants' request given	276	187
Plaintiff's requests refused	276	187
Verdict	278	188
Notice of intention to move for new trial	278	188
Judgment	279	188
Order granting time to move for new trial	280	189
Specification of errors	282	191
Judge's certificate to statement	305	212
Affidavit of Van B. De Lashmutt	307	213
George B. McAulay	307	213
Samuel R. Devine	312	215
Frank C. Loring and X. S. Burke	317	218
Michael Carlin	321	220
Charles Sweeney	324	222
W. Clayton Miller	326	223
John L. Smith	328	224
Order making affidavit of Chas. W. O'Neil part of record	330	225
Supplemental transcript from district court	331	225
Affidavit of Chas. W. O'Neil	332	225
Acknowledgment of service of amendments, &c.	337	228
Clerk's certificate	338	229
Order denying motion for new trial	340	229
Order fixing amount of appeal bond, &c.	341	230
Stipulation as to filing transcript on appeal, &c.	342	230
Notice of appeal	343	231
Bond on appeal	345	231
Præcipe for transcript on appeal	348	233
Clerk's certificate	349	233
Hearing and submission	350	234
Judgment	351	234
Clerk's certificate to judgment	352	235
Opinion	353	235
Clerk's certificate to opinion	360	239
Bond on writ of error	361	240
Clerk's certificate to bond	364	241
Clerk's certificate to transcript of record	365	242
Writ of error	366	242
Citation and proof of service of same	368	242
Assignment of errors	369	244

a Supreme Court, Idaho Ter. Jan. Term, 1889.

STEMWINDER M'N'G CO., Pl'ff & App.,
v.
EMMA & LAST CHANCE CON. M'N'G COS. *et al.*, Def't- & Resp.

Transcript.

Filed Jan. 30th, 1889.

S. H. HAYS, *Clerk.*

b In the District Court of the First Judicial District of the Territory of Idaho in and for the County of Shoshone.

THE STEMWINDER MINING COMPANY, Plaintiff,
vs.
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, Defendants.

Pleas begun, continued, and held in the district court of the first judicial district of the Territory of Idaho in and for the county of Shoshone, before Hon. John L. Logan, district judge, on the 5th day of August, A. D. 1887, and judgment rendered in open court by and before said judge of said court on the 5th day of October, A. D. 1888.

THE STEMWINDER MINING COMPANY, Plaintiff,
vs.
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, Defendants.

Be it remembered that on the 5th day of August, A. D. 1887, the plaintiff filed its complaint in said action; which said complaint is in words and figures as follows, to wit:

1 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

TERRITORY OF IDAHO, *County of Shoshone,* } *ss:*

STEMWINDER
vs.
EMMA.

THE STEMWINDER MINING COMPANY, Plaintiff,
vs.
JOHN M. BURKE, MICHAEL FLAHERTY, MIKE CARLIN, Louis Goldsmith, and The Emma and Last Chance Consolidated Mining Company, Defendants. } Complaint.

Now comes the plaintiff above named and, complaining of the said defendants, for cause of action alleges and shows to the court—

That the plaintiff, The Stemwinder Mining Company, is now and ever since the 10th day of March, 1887, has been a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and as such owns mining property in and is doing business in the Territory of Idaho, county of Shoshone; and said corporation, among other things, was organized for the purpose of owning mines and carrying on the business of mining and developing mines in Idaho Territory, and has in all respects fully complied with all the laws of Idaho Territory respecting the duties of corporations desiring to carry on the business in Idaho Territory, and has a duly authorized agent in Shoshone county, upon whom all legal process can be served as agent of plaintiff.

That the defendant The Emma and Last Chance Consolidated Mining Company is a corporation organized and existing under the laws of the State of Oregon, with its principal place of business at Portland, Oregon.

That ever since the 11th day of March, 1887, the plaintiff has been and is now the owner of, subject only to the paramount title of the United States, and in the possession of and entitled to
2 the possession of that certain mine and mining claim, containing a lode of rock in place bearing silver and other precious metals, situate in the Yreka mining district, Idaho Territory, called the Stemwinder mining claim, and more particularly described as follows:

Beginning at the southeasterly end of the said Stemwinder mining claim, as shown by the amended location thereof, at a post upon which the said amended location notice is posted, thence north 71 degs. and 50 mins. west 350 feet to the southwest corner, whence a prominent peak bears south 8 degs. and 22 mins. east, another prominent peak bears north 84 degs. and 35 mins. east; thence north 11 degs. and 58 mins. west 600 feet to the northwest corner, whence corner 3 of survey 550 bears S. 50 degs. 19 mins. east 97.7 feet; thence south 71 degs. and 50 mins. east 700 feet to the northeast corner; thence south 11 degs. and 58 mins. east 600 feet to the southeast corner; thence north 71 degs. and 50 mins. west 350 feet to the place of beginning, and situated about one-half mile southwesterly from the town of Wardner, on the easterly hillside.

That the defendants John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, claiming to be the owners of an alleged adjacent mining claim called the Emma mine or lode, on or about the 15th day of December, A. D. 1886, wrongfully and without right or title, caused said alleged Emma mining claim to be so surveyed as to crop upon and overlap the Stemwinder mining claim and lode as located, held, owned, and possessed by the plaintiff, and such survey includes a portion of said Stemwinder mining claim and lode described as follows, to wit:

Beginning at a point on northerly end line of Stemwinder mining claim or lode, also on northerly side line of Emma lode, being survey No. 550, whence corner No. 1 of said survey 550 bears south 82 degs. and 23 mins. west 82 feet, thence south 71 degs. and 50 mins. east 534.9 feet to corner No. 2 of the Stemwinder

lode; thence south 11 degs. and 58 mins. east 59.6 feet; thence north 80 degs. and 40 mins. west 612.8 feet; thence north 1 deg. east 114 feet; thence north 82 degs. and 23 mins. east 82.4 feet to point of beginning, containing an area of 1.38 acres in conflict.

3 That on or about the 6th day of May, 1887, the defendants John M. Burke, Mike Carlin, Michael Flaherty, and Louis Goldsmith filed the field-notes and a diagram or plat of said survey of the alleged Emma mining claim, and also an application for a United States patent for said mining claim, in the United States land office at Cœur d'Alene City, Idaho Territory, and caused the register of said land office to give notice of said application for patent by publication as required by law; that in and by said application for patent the said defendants, applicants therein, wrongfully and without right or title set up and alleged that they were the owners of and in the possession of the whole of the alleged and pretended Emma mining claim, inclusive of the premises last above described and the lode therein, which said last above described portion was and is a part of the Stemwinder mining claim and lode and was and is the property of and in the possession of the plaintiff.

That the plaintiff company, during the sixty days' period of publication of notice of the said application for patent for said alleged and pretended Emma mining claim, filed in said land office, under oath, as required by law, a protest and adverse claim to said application and for said last-described premises and the lode therein, in due form, and showing the nature, extent, and boundaries of the adverse claim of the plaintiff, and thereupon proceedings on said application in said land office were and are stayed to await and abide the determination by a court of competent jurisdiction of the right of possession to said last-described premises and the rights and titles of the respective parties therein and thereto, and to that end and for such purpose the plaintiff now brings this suit, the period of thirty days not having elapsed since the filing of said protest and adverse claim.

That the defendants and all of them still maintain and prosecute said application for patent for the alleged and pretended Emma mining claim, and thereby the title and possession of plaintiff and the right to the possession of plaintiff in and to the last above described premises, being the area thus brought in conflict between the Stemwinder mining claim and lode and the alleged and pretended Emma mining claim, are wrongfully impeached,

4 clouded, questioned, and encumbered and the value of plaintiff's estate and property therein greatly depreciated, to its great damage.

That subsequent to the filing of said application for a patent by the aforesaid applicants the other defendant herein, to wit, the Emma & Last Chance Consolidated Mining Company, purchased an undivided interest in and to the alleged Emma mining claim, the nature and extent of which is not known to plaintiff, and said company, defendant, claims to own and hold some interest in and to said conflict area inimicable and adverse to the right of possession and possession entitled thereto of plaintiff and is beneficially interested in

the event of said application for a patent and of this suit, and is therefore a necessary and proper party defendant herein, and is therefore made a defendant herein.

The plaintiff therefore prays the judgment and relief against the defendants and each of them:

1. That the plaintiff is the owner of and lawfully in and entitled to the possession of the last above described premises, the area in conflict between the Stemwinder mining claim and the alleged Emma mining claim, and the lode therein, and quieting and confirming plaintiff's title thereto and the possession thereof.

2. That the defendants have no title to or right of possession of said conflict area or the lode therein or any part thereof.

3. That the defendants and each of them be restrained, pending this action and upon the trial, perpetually from entering in or upon said conflict area or lode therein or upon any part thereof or mining in or extracting any ores or minerals therefrom, and from in any way interfering with the possession thereof, and the plaintiff have all other and further proper relief, with costs of suit.

GANAHL AND HAGAN,
Plaintiff's Attorneys.

5 TERRITORY OF IDAHO, } ss:
County of Shoshone, }

George B. McAulay, being first duly sworn, deposes and says—That he is the resident agent of the plaintiff, The Stemwinder Mining Company, residing in the town of Wardner, Shoshone county, Idaho Territory, and authorized to make this affidavit for and on behalf of said company; that there is no other officer of said company is said county and Territory, and affiant is familiar with the facts at issue herein; that he has heard the said complaint read and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

GEO. B. McAULAY.

Subscribed and sworn to before me this the 4th day of August, 1887.

THOS. J. MULLEN,
[SEAL.] *Notary Public.*

Endorsed: No. 282. In the first jud. court, Territory of Idaho, county of Shoshone. The Stemwinder Mining Company, pl'ff, *vs.* John M. Burke *et al.*, def'ts. (Stemwinder *vs.* Emma.) Complaint. Filed August 5th, 1887. F. E. Lucas, clerk. Ganahl and Hagan, att'ys for pl'ff.

And afterwards and on the 12th day of August, A. D. 1887, plaintiff filed its summons, which is in words and figures as follows, to wit:

6 *Summons.*

(Title of Court and Cause.)

The people of the United States in the Territory of Idaho to John M. Burke, Michael Flaherty, Mike Carlin, Louis Goldsmith, and The Emma and Last Chance Consolidated Mining Company, defendants:

You are hereby notified that there is now on file in the office of the clerk of the district court of the first judicial district of said Territory, in Murray, county of Shoshone, the complaint of the above-named plaintiff, wherein judgment is demanded against you that the plaintiff is the owner of and lawfully in and entitled to the possession of the last above described premises, the area in conflict between the Stemwinder mining claim and the alleged Emma mining claim, and the lode therein, and quieting and confirming plaintiff's title thereto and the possession thereof.

That the defendants have no title to or right of possession of said conflict area or the lode therein or any part thereof.

That the defendants and each of them be restrained, pending this action and upon trial, perpetually from entering in or upon said conflict area or the lode therein or upon any part thereof or mining in or extracting any ores or minerals therefrom, and from in any way interfering with the possession thereof, and the plaintiff have all other and further proper relief, with costs of suit. Said mining claims and conflict area are situated in the Yreka mining district, county of Shoshone, Territory of Idaho.

And you are also notified that unless you appear and answer to said complaint within ten days after the service hereof if served within Shoshone county, and within twenty days if served out of said county but within said judicial district, and within forty days if served out of said district (exclusive of the day of service), the plaintiff will have your default entered and apply to the court for the relief demanded in the complaint herein.

Given under my hand and the seal of the district court of
7 the first judicial district of Idaho Territory in and for Shoshone county this 5th day of August, A. D. 1887.

[SEAL.] F. E. LUCAS, *Clerk.*

Endorsed: No. 282. In the district court, county of Shoshone. Original summons. The Stemwinder Mining Company, plaintiff, *vs.* John M. Burke *et al.*, def'ts. Filed on return, August 12th, 1887. F. E. Lucas, clerk. Ganahl and Hagan, attorneys for plaintiff.

And afterwards and on the 12th day of August, 1887, the defendants filed their appearance by attorney; which appearance is in words and figures as follows, to wit:

8 (Title of Court and Cause.)

(STEMWINDER *vs.* EMMA.)

I hereby enter my appearance in the above-entitled action as the

attorney for each and all the above-named defendants, and hereby enter the appearance of each and every of the defendants, and will enter their plea herein in pursuance of the stipulation hereto appended.

W. B. HEYBURN,
Attorney for the Above-Named Defendants.

August 12th, 1887.

It is hereby stipulated that the above-named defendants can have thirty days in which to file and serve their answers herein.

GANAHL AND HAGAN,
Att'ys for Plaintiff.

August 12th, 1887.

Endorsed: No. 282. In 1st dist. court, Shoshone county. The Stemwinder M. Co. pl'ff, *vs.* John M. Burke *et al.*, def'ts. Appearance. Original. Filed August 12th, 1887. F. E. Lucas, clerk.

And afterwards and on the 12th day of August, A. D. 1887, the defendants filed their demurrer to the plaintiff's complaint, which is in words and figures as follows, to wit:

9 (Title of Court and Cause.)

Demurrer to Complaint.

Now come the above-named defendants and demur to the complaint of the above-named plaintiff on file herein, and for cause of demurrer allege that said complaint does not state facts sufficient to constitute a cause of action.

W. B. HEYBURN,
Attorney for Defendants.

Endorsed: No. 282. In the dist. court, first dist. of Idaho, Shoshone Co. The Stemwinder Mining Co. *vs.* J. M. Burke *et al.* Demurrer to complaint. Filed August 12th, 1887. F. E. Lucas, clerk. W. B. Heyburn, attorney for def'ts.

And afterwards and on the 26th day of October, 1887, being a day of said court, a journal entry was made, which is in words and figures as follows, to wit:

10 Fourth Judicial Day, Wednesday, October 26th, 1887, October Term.

THE STEMWINDER M'G CO.
vs.
JOHN M. BURKE *et al.*

At this day appeared the plaintiff, by Messrs. Ganahl and Hagan and W. Sweet, Esq., its attorneys, and the defendants, by W. B. Heyburn, Esq., their attorney, appeared also, and the demurrer to the complaint herein came on to be heard by the court, and after

hearing the arguments of counsel and being sufficiently advised in the premises the court took the matter under advisement.

And afterwards and on the 29th day of October, A. D. 1887, being a day of said court, a journal entry was made and entered, which is in words and figures as follows, to wit:

Seventh Judicial Day, Saturday, October 29th, 1887, October Term.

THE STEMWINDER M'G CO. *vs.* JOHN M. BURKE *et al.* } No. 282.

At this day the demurrer to the complaint heretofore argued & submitted was by the court overruled.

And afterwards and on the 31st day of October, A. D. 1887, being a day of said court, a journal entry was made and entered, which is in words and figures as follows, to wit:

11 Eighth Judicial Day, Monday, October 31st, 1887, October Term.

THE STEMWINDER M'G CO. *vs.* JOHN M. BURKE *et al.* } No. 282.

At this day the defendants were given five days in which to prepare and file their answer herein.

And afterwards and on the 14th day of November, A. D. 1887, defendants filed their answer to plaintiff's complaint; which answer is in words and figures as follows, to wit:

12 In the District Court of the First Judicial District of Idaho Territory in and for Shoshone County.

THE STEMWINDER MINING COMPANY, Plaintiff, *vs.* JOHN M. BURKE, MICHAEL FLAHERTY, MIKE Carlin, Louis Goldsmith, and The Emma and Last Chance Consolidated Mining Company, Defendants. } No. 282. Answer.

Now come the said defendants and, answering the said complaint herein, say—

1st. That since the 6th day of May, 1887, the said defendants, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, have sold and conveyed by absolute deed all their right, title, and interest and estate in said Emma mining claim mentioned in the plaintiff's complaint, filed herein, unto the above-named Emma and Last Chance Consolidated Mining Company, and that the said Emma and Last Chance Consolidated Mining Company claim is now the lawful owner of such mining claim.

Defendants say that as to whether the plaintiff is now or ever was since the 10th day of March, 1887, or at any time a corporation duly organized and existing under the laws of the State of Oregon, or at all, and as such own mining properties in or did or does any business in the Territory of Idaho, county of Shoshone, or as to whether the said corporation was formed or organized for the purpose of owning mines and carrying on a mining business or any business in Idaho, or whether said corporation had or has in any or all respects complied with the laws of Idaho Territory respecting corporations desiring to carry on business in Idaho Territory, these defendants have not sufficient information upon which to base a belief and deni*es* the same.

2nd. Defendants deny that the plaintiff was since the 11th day of March, 1887, or since or at any time was, or that it is now
13 the owner (subject to the paramount title of the United States) or at all, or that it was in possession or entitled to the possession of the tract of land or mining claim or ground mentioned or described in the complaint herein as the Stemwinder mining claim or of any part thereof.

3rd. Defendants deny that the description set out in the complaint herein is in any manner a correct or any description of the ground heretofore claimed as the pretended Stemwinder mining claim, or that the same was ever located as the Stemwinder mining claim, or that the ground or premises so described or any part thereof were ever at any time located as the Stemwinder mining claim by any person or at all.

4th. Defendants deny that the application for United States patent heretofore made by the above-named defendants, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, for the Emma mining claim overlaps or in any manner includes any portion of the pretended Stemwinder mining claim, but alleges that *that* all and every part and parcel of the piece or parcel of land described in plaintiff's complaint as being the portion of ground or mining claim in conflict between the Emma mining claim, the property of these defendants, and the pretended Stemwinder mining claim is a part of the Emma mining claim, the property of these defendants, and not otherwise, and the same is a part of the said Emma mining claim as owned, held, and possessed by these defendants, and not otherwise.

And defendants deny that the said tract of land and mining ground mentioned in the complaint and called the Stemwinder mining claim, or any part thereof, or the area alleged to be in conflict, or any part thereof, as mentioned in said complaint herein, or that any part or parcel thereof is the property of the plaintiff either by virtue of or as a part of the alleged Stemwinder Lode mining claim or of any part thereof or by any manner or means.

5th. The defendants, further answering, herein allege and show to the court—

That heretofore, to wit, on the 17th day of September, A. D. 1885, J. L. Smith, Mike Carlin, and John M. Burke, who were then and there citizens of the United States over the age of twenty-one years,

entered upon and explored the ground of the premises re-
14 ferred to herein as the Emma mining claim, and being the same premises for which the defendants John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith made application for a United States patent, as in said complaint alleged, and discovered therein and thereon a vein of mineral-bearing rock in place, bearing silver and other precious and other valuable minerals, and that the said premises and every part and parcel thereof were then and there vacant, unoccupied, and unappropriated public mineral lands of the United States. Whereupon, having discovered said vein, the said parties there and then located, appropriated, marked, and defined said premises as a mining claim so distinctly upon the ground that its boundaries could and can be readily traced.

6th. That the premises so located are the same premises referred to in the complaint herein as the Emma mining claim, for which defendants have applied for a patent of the United States as aforesaid, and said location, at the time of making the discovery and marking the boundaries aforesaid, placed thereon, at or near the place of such discovery, a written notice of the location thereof, containing the name of the claim so located, to wit, the Emma; the date of such location, the names of the locators and the interest of each of them, the quantity of feet claimed along the ledge or lode, the width claimed from the middle of the vein, and such a description of the locality of the claim by reference to natural landmarks and permanent objects, contiguous claims, as to render the situation reasonably certain from the letter of the notice itself.

7th. That within and during the period of fifteen days after the date of such location the locators thereof went to the office of the mining recorder of the Yreka mining district, in which said claim is situated, for the purpose of having the said claim by him recorded, and at all times during the said period of fifteen days and for a long time thereafter could not find such recorder, although they made diligent search and inquiry for him and his whereabouts, and afterwards, to wit, on the — day of ——, 188–, having found said recorder, caused the said notice to be recorded in Book —, page —, in the records of said district.

15 8th. That on the 22nd day of September, 1885, said locators, or one of them, presented a copy of the notice so posted on the said Emma vein as aforesaid to the recorder of Shoshone county, in which said county the mining claim so located and called the Emma is situated, and made the affidavit therein prescribed by law, and caused the said notice and affidavit to be recorded in the office of said recorder of said county on the 22nd day of September, 1885, in Book "C" of quartz claim locations, on page 288; that said county recorder was the nearest recorder and this the nearest office to the claim which the locators could find during the period described by law in which to record a mining claim; that a copy of said notice of location so recorded as aforesaid is hereto attached and made a part of this answer.

9th. That the portion and area of the said Emma Lode mining claim so surveyed for a patent and described in the complaint herein

as the area in conflict is within the exterior boundaries of the Emma mining claim as so located and sought to be patented under the application aforesaid, together with the entire area included in the original location of said Emma mining claim, being in the possession of the said locators and their grantees, who have at all times worked, mined, and developed the same in accordance with the mining laws of the United States, the Territory of Idaho, and the local rules and customs of the said Yreka mining district, and the defendants are now, through the said Emma and Last Chance Consolidated Mining Company, in the possession of and working and mining upon all of said Emma Lode mining claim as so located, as aforesaid, and by virtue of the premises the said Emma and Last Chance Consolidated Mining Company is entitled to the sole and exclusive possession of the said Emma Lode mining claim as located as aforesaid and to every part thereof.

10th. That by his deed, duly made, executed, and delivered on the 13th day of November, 1885, said John Flaherty sold and conveyed to said Michael Flaherty his undivided one-fourth interest in said Emma mining claim, and by deed, duly made, executed, and delivered, the said Michael Flaherty did, on the 13th day of
16 June, 1887, sell and convey unto Frank R. Moore his undivided one-fourth interest in said Emma mining claim, and by his deed, duly made, executed, and delivered, the said Michael Carlin did, on the 15th day of June, 1887, sell and convey unto the said Frank R. Moore his undivided one-fourth interest in and to the said Emma mining claim, and by his deed, duly made, executed, and delivered, the said Frank R. Moore did, on the 14th day of July, 1887, sell and convey unto the Emma and Last Chance Consolidated Mining Company aforesaid the undivided one-half interest in and to the Emma mining claim, and the said J. L. Smith did by his deed, duly made, executed, and delivered, deliver unto Louis Goldsmith aforesaid—sell and convey unto Louis Goldsmith—an undivided one-fourth interest in and to the said Emma mining claim, and by his deed, duly made, executed, and delivered, the said Louis Goldsmith did, on the 14th day of July, 1887, sell and convey unto the Emma and Last Chance Consolidated Mining Company aforesaid the undivided one-fourth interest in said mining claim, and the said John M. Burke, by his deed duly made, executed, and delivered on the said 14th day of July, 1887, did sell and convey unto the said Emma and Last Chance Consolidated Mining Company his undivided one-fourth interest in said Emma mining claim.

11th. That the said Emma and Last Chance Consolidated Mining Company is a corporation duly organized under the laws of the State of Oregon, and by virtue of a compliance with the requirements of the laws of the Territory of Idaho is entitled to and is carrying on a mining business in Shoshone county, in said Territory, and is in the actual, sole, and exclusive possession and is entitled to the actual, sole, and exclusive possession of the aforesaid Emma lode mining claim and of every part and parcel thereof and to receive a patent from the United States therefor.

12th. That the alleged and pretended Stemwinder mining claim, as now claimed by plaintiff, was never at any time located, staked, marked, or defined in accordance with the requirements of law, if at all, until long subsequent to the aforesaid location of the Emma mining claim by the locators thereof, and that the said plaintiff is not nor has ever been in possession of the area so in conflict as aforesaid.

17 Wherefore, having fully answered the complaint, the defendants pray the judgment of this court that the action herein brought by plaintiff in support of its adverse claim be dismissed, and that it take nothing by said action.

That the defendant, The Emma and Last Chance Consolidated Mining Company, be declared to be the owner of and entitled to the possession of and the right of possession of all the Emma Lode mining claim, including the area in conflict, as in said complaint alleged, and that the said defendants be decreed to be entitled to have and receive a patent from the Government of the United States therefor, and that the defendants have and recover of and from said plaintiff its costs herein expended, including a reasonable attorney's fees, to be allowed and fixed by the court.

W. B. HEYBURN,
Attorney for Defendants.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

John M. Burke, being first duly sworn, deposes and says as follows, to wit:

That he is one of the defendants above named, and that in addition thereto he is one of the officers of the said Emma and Last Chance Consolidated Mining Company, to wit, the general superintendent thereof; that the affiant is now within the county and Territory aforesaid, and the principal place of business of said corporation is at the city of Portland, in the State of Oregon; that affiant is further now the resident and local agent of said corporation at the present time in said county and Territory; that the affiant has heard read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he verily believes them to be true.

JOHN M. BURKE.

Subscribed and sworn to before me this 4th day of November, A. D. 1887.

[SEAL.] F. E. LUCAS, *Clerk.*

18 *Notice of Location of a Quartz Claim.*

Notice is hereby given to whom it may concern that John Flaherty, J. L. Smith, M. Carlin, and John M. Burke, citizens of the United States over the age of twenty-one years, having discovered a vein or lode of quartz or rock in place bearing silver, gold, etc.,

within the limits of a claim hereby located, have this day, under and in accordance with the Revised Statutes of the United States, chapter six, title thirty-two, located fifteen hundred linear feet of this vein or lode with surface ground six hundred feet in width, situated in Yreka mining district, county of Shoshone, and known as the Emma Quartz mining claim, and extending 1,000 feet east and 500 feet west from this notice, at the discovery or prospect shaft, which is 500 feet from westerly end line, the exterior boundaries of this claim being distinctly marked by reference to some natural object or permanent monuments and more particularly described as follows, to wit: On Iron creek, about two and one-half miles in a southerly direction from Jackass prairie and being northerly and adjoining Stemwinder; and we intend to hold and work said claim as provided by the local customs and rules of miners and the mining statutes of the United States.

Dated on the ground this 17th day of September, 1885.

Discovered September 13th, 1885.

Located September 17th, 1885.

JOHN FLAHERTY,
J. L. SMITH,
M. CARLIN,
JOHN M. BURKE, *Locators.*

TERRITORY OF IDAHO, }
County of Shoshone, } ss:

I, John Flaherty, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith called the Emma ledge, lode, or claim, and that the ground therein described or any part thereof has not, to the best of my knowl-
19 edge or belief, been heretofore located according to the laws of the United States and of this Territory, or if so located the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws.

JOHN FLAHERTY.

Subscribed and sworn to before me this 22nd day of September, 1885.

THOS. E. McLELLAND,
County Recorder.

Filed for record September 22nd, 1885, at 3 o'clock p. m., at the request of John Flaherty.

THOS. E. McLELLAND,
County Recorder.

TERRITORY OF IDAHO, }
County of Shoshone, } ss:

I, Thos. E. McLelland, county recorder in and for said county, do hereby certify that the foregoing copy of notice of location, Emma

lode, has been by me compared with the original, and that it is a correct transcript therefrom as the same appears of record in Book "C," on page 288 of quartz locations thereof, at my office and in my custody.

In witness whereof I hereunto set my hand and affix my official seal this 2nd day of November, A. D. 1887.

THOS. E. McLELLAND, *Recorder*,
By M. J. SWEENEY, *Deputy*.

Endorsed: Received a copy of the within answer this 4th day of November, 1887. Ganahl & Hagan, pl'ff's att'ys. No. 282. In the district court of the first judicial district of Idaho Territory in and for Shoshone county. The Stemwinder Mining Company, pl'ff, *vs.* John M. Burke *et al.*, def'ts. Answer of defendants. Filed the 4th day of November, 1887. F. E. Lucas, clerk. W. B. Heyburn, attorney for defendants.

And afterwards and on the 22nd day of November, A. D. 1887, being a day of said court, a journal entry was made and entered, which is in the words and figures as follows, to wit:

Twenty-seventh Judicial Day, Tuesday, November 22nd, 1887, October Term.

THE STEMWINDER M'G CO.
vs.
JOHN M. BURKE *et al.* } No. 282.

At this day, by consent of the parties hereto, this cause was continued for the term.

And afterwards and on the 24th day of September, A. D. 1888, during the trial of said cause, a journal entry was made, which is in words and figures as follows, to wit:

Fifty-first Judicial Day, Monday, September 24th, A. D. 1888, June Term, A. D. 1888.

THE STEMWINDER MINING COMPANY
vs.
THE EMMA AND LAST CHANCE CON. M'G CO. } No. 282.

At this day came the plaintiff, by Messrs. Hagan and Allen, its counsel, and the defendants, by their counsel, Messrs. Woods & Heyburn, appeared also, and this cause came on for trial.

The clerk was directed to draw a jury, whereupon the following proceedings were had, to wit:

William Williams, John King, Eugene Sage, Wm. McKay, H. R. Rupert, R. C. Vanderford, Joseph Le Grande, F. A. Weber, J. F. Kraus, R. M. Davis, H. E. Wolf, Albert Otto, Chas. Bender, David Clark, Ernst Rammelmeyer, Chas. Graham, Ben. Brush, Jno. R. Kinnear, H. B. Cohn, Ambrose Craig, and Wm. A. Parker were duly drawn, sworn, and examined on their *voir dire*.

And John King, J. F. Kraus, and H. E. Wolf were excused for cause.

And Chas. Bender, C. D. Varnum, Ben. Brush, and R. C. Vanderford were peremptorily challenged by the plaintiff and they were excused.

22 And Albert Otto and William Williams and Ambrose Craig were challenged peremptorily by the defense and they were excused.

Now, at this time, the following-named jurors, having been already sworn and examined on their *voir dire*, were duly sworn and empannelled as a jury for the trial of this cause, to wit: Eugene Sage, Wm. M. McKay, H. R. Rupert, Jos. Le Grange, F. A. Weber, David Clark, R. M. Davis, Ernst Rammelmeyer, Chas. Graham, W. A. Parker, Jno. R. Kinnear, H. B. Cohn.

And at this time, the court having admonished the jury, as required by statute, court took a recess until 2 o'clock p. m.

At two o'clock p. m., all parties being present in open court and the jury having been duly polled, the trial of this cause was resumed, and Frank C. Loring and X. S. Burke were duly called, sworn, and examined as witnesses for and on behalf of the plaintiff.

And the plaintiff at this time offers certain documentary evidence.

And the court having admonished the jury, as required by the statute, the further hearing of this cause was postponed until the incoming of court to-morrow morning.

And afterwards and on the 25th day of September, 1888, during the trial of said cause, a journal entry was made and entered, which is in the words and figures as follows, to wit:

23 Fifty-second Judicial Day, Tuesday, September 25th, 1888, June Term, A. D. 1888.

THE STEMWINDER M'G CO.
vs.
THE EMMA AND LAST CHANCE CON. MIN. CO. *et al.* } No. 282.

At this day, all parties hereto being present in open court and the jury having been duly polled, the trial of this cause was r-sumed and the following proceedings had, to wit: Reese Price and Joseph Cleaver were duly called, sworn, and examined as witnesses for and on behalf of the plaintiff, and at this time, the jury having been duly admonished by the court, as required by the statute, court took a recess until 1.30 o'clock p. m.

Now, at 1.30 o'clock p. m., the jury having been duly polled and all parties hereto being present in open court, the trial of this cause was resumed.

And John King and Geo. B. McAulay were duly called, sworn, and examined as witnesses for and on behalf of the plaintiff, and, the jury having been duly admonished by the court, as required by the statute, the further hearing of this cause was postponed until the incoming of court to-morrow morning.

And afterwards and on the 26th day of September, A. D. 1888, during the trial of said cause, the following journal entry was made and entered, which is in the words and figures as follows, to wit:

24 Fifty-third Judicial Day, Wednesday, September 26th, 1888, June Term, A. D. 1888.

THE STEMWINDER MINING COMPANY
vs.
THE EMMA AND LAST CHANCE CON. MIN. COMPANY *et al.* } No. 282.

At this day, all parties hereto being present in open court and the jury having been duly polled, the trial of this cause was resumed and the following proceedings had, to wit: Geo. B. McAulay was recalled and examined as a witness for -nd on behalf of the plaintiff, and the plaintiff at this time offers certain documentary evidence and a post in evidence.

And at this time, the court having admonished the jury, as required by the statute, court took a recess until 1.30 o'clock p. m.

Now, at 1.30 o'clock p. m., all parties hereto being present in open court and the jury having been duly polled, the trial of this cause was resumed, and Van B. De Lashmutt was duly called, sworn, and examined as a witness for and on behalf of the plaintiff, and Frank C. Loring and John King were recalled and examined as witnesses for and on behalf of the plaintiff, and the plaintiff at this time offers certain documentary evidence, and J. L. Smith and M. J. Sweeny were duly called, sworn, and examined as witnesses for and on behalf of the plaintiff, and Geo. B. McAulay was again recalled and examined as a witness for and on behalf of the plaintiff.

And the court having admonished the jury, as required by the statute, the further hearing of this cause was postponed until the incoming of court to-morrow morning.

And afterwards and on the 27th day of September, A. D. 1888, during the trial of said cause, a journal entry was made and entered; which is in words and figures as follows, to wit:

25 Fifty-fourth Judicial Day, Thursday, September 27th, A. D. 1888, June Term, A. D. 1888.

THE STEMWINDER MINING COMPANY
vs.
THE EMMA AND LAST CHANCE CON. M'NG CO. *et al.* } No. 282.

At this day, all parties hereto being present in open court and the jury having been duly polled, the trial of this cause was resumed and the following proceedings had, to wit:

Albert Hagan was duly called, sworn, and examined as a witness for and on behalf of the plaintiff, and John King and Van B. De Lashmutt were recalled and examined as witnesses for and on behalf of the plaintiff.

And the plaintiff rests.

Now, at this time, defendants' motion for a nonsuit herein came on to be heard by the court, and, after hearing the arguments of counsel and being fully advised in the premises, the said motion was by the court denied.

And the jury having been duly admonished by the court, as required by the statute, court at this time took a recess until 2 o'clock p. m.

At 2 o'clock p. m , the jury having been duly polled and all parties hereto being present in open court, the trial of this cause was resumed.

And Charles Sweeney, George R. Trask, Michael Carlin, and J. L. Smith were duly called, sworn, and examined as witnesses for and on behalf of the defense, and the defense offers certain documentary evidence.

And the court having admonished the jury, as required by the statutes, the further hearing of this cause was postponed until the incoming of court to-morrow morning.

And afterwards and on the 28th day of September, A. D. 1888, at the trial of said cause, a journal entry was made and entered, which is in the words and figures as follows, to wit:

26 Fifty-fifth Judicial Day, Friday, September 28th, A. D. 1888, June Term, A. D. 1888.

THE STEMWINDER MINING COMPANY
vs.
THE EMMA AND LAST CHANCE CON. MIN. CO. *et al.* } No. 282.

At this day, all parties hereto being present in open court and the jury having been duly polled, the trial of this cause was resumed and the following proceedings had, to wit:

Michael Carlin and George R. Trask were recalled and examined as witnesses for and on behalf of the defense.

And David Wiseman and M. J. Sweeny were duly called, sworn, and examined as witnesses for and on behalf of the defense, and the defense at this time offers certain documentary evidence.

And George R. Trask and Michael Carlin were again recalled and examined as witnesses for and on behalf of the defense.

And Chas. Sweeny and John M. Burke were duly called, sworn, and examined as witnesses for and on behalf of the defense, and at this time the defense rests.

And X. S. Burke was recalled and examined as a witness for and on behalf of the plaintiff, and the plaintiff rests.

And the court having admonished the jury, as required by the statute, court took a recess until 2 o'clock p. m.

At 2 o'clock p. m., all parties hereto being present in open court and the jury having been duly polled, the trial of this cause was resumed, and after the partial arguments of counsel the court admonished the jury, as required by the statute, and the further hearing of this cause was postponed until the incoming of court to-morrow morning.

And afterwards and on the 29th day of September, A. D. 1888, plaintiff filed its requests, which *is* in the words and figures as follows, to wit:

27 Plaintiff requests the court to instruct jury as follows:

1st. By the act of Congress which took effect May 10th, 1872, "all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase by citizens of the United States and those who have declared their intention to become such under the regulations prescribed by law and according to the local customs and rules of miners in the several mining districts, as well as the territorial laws, so far as the latter are applicable and not inconsistent with the laws of the United States."

Both of the locations at bar were made, if at all, subsequent to the passage of that act of Congress, and therefore whatever rights either of the parties acquired have been acquired by force of that act of Congress, known as the mining law of May 10, 1872, and the local territorial laws, so far as they are applicable and not inconsistent with the national law.

Under the act of Congress referred to and under the territorial law also the locator is authorized to locate a claim not more than 1,500 feet in length along the vein or lode, and it is further provided that no claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claim be limited to less than 25 feet on each side of the middle of the vein at the surface.

These words I quote from the statute itself: "And in the absence of a mining rule or custom in force at the time a location is made at the place where it is made the location may extend to the distance of 300 feet on each side of the middle of the vein at the surface—that is to say, the claim may be 1,500 feet in length along the vein by 600 feet in width, including 300 feet on each side of the middle of the vein, and no locator can claim to hold any more than is given to him by reason of the laws to which I have referred." "Fifteen hundred feet along the vein" are the words of the statute, and "300 feet on each side of the middle of the vein" seems to limit the amount of land that can be located in any one mining location. There is no pretense or claim in this case that there was any mining

28 rule or custom in force in the Yreka mining district at the time these locations were made other than the national and territorial laws to which I have referred, and therefore you have no custom or rule established and in force in the district to consider in making up your verdict in this case.

You are further instructed, gentlemen of the jury, that by the act of Congress it is provided that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located, so that you will perceive that no rights can be acquired under the statute by a location made before the discovery of a vein within the limits located.

A vein or lode authorized to be located is a seam or fissure in the

earth's crust filled with quartz or some kind of rock in place carrying gold, silver, or other valuable mineral deposits named in the statute, but it is necessary, at all events, that the locator should discover a genuine mineral vein or lode, whether large or small, rich or poor, at the point of discovery within the limits of the claim located in order to entitle the miner to make a valid location to include such vein or lode.

Charged. J. L. L.

2nd. The Government gives its lands to those citizens who may discover precious metal ores therein upon the condition that the locators will define the subject of the grant—in other words, the mining location—with such certainty as may be necessary to prevent mistakes on the part of the Government or on the part of other citizens who may be asking a like privilege. This is reasonable and necessary to justly administer the law, and therefore it may be laid down as a general proposition of law that without a description of the premises in the notice of location the location will be void.

It is well here for the court to instruct you first as to the actual wording of the statute of the United States and the territorial law both regarding the location of a mining claim, so that there can be no mistake in the minds of the jury as to the mining law or the instructions which the court will give you.

Section 2324 of the Revised Statutes of the United States provides, among other things, that the location of a mining claim
29 must be distinctly marked upon the ground, so that its boundaries can be readily traced, and all records of mining claims hereafter made will contain the name or names of the locator, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.

Supplemental to that act is the act of the territorial Legislature of Idaho, section 3101 of the Revised Statutes of Idaho, which provides that the locator of any lode mining claim must, at the time of making the location, place a substantial stake or post not less than four inches square or diameter at each end of the ground claimed and as near as practicable along the course or line of the vein or ledge, and also a similar stake or post at each corner of the location. Such stakes or posts must be at least four feet high above the surface and must each be marked distinctly with the name of the claim, and the notice of the location hereinafter mentioned must be conspicuously attached to one of said centre end posts, so that the same may be easily read.

Section 3102 of the Revised Statutes of Idaho says the notice must contain the date of location, the name of the locators, the name of the claim, ledge, or lode, the quantity of feet claimed along the ledge or lode, the width claimed from the middle of the vein, and must also give such a description of the locality of the claim by reference to natural landmarks or fixed objects and contiguous

claims, if there be any, as to render the situation of the same reasonably certain from the letter of the notice itself.

It will thus be observed that while the act of Congress of May 10th, 1872, does not make it obligatory to record notices of location, the statute of Idaho does, and therefore is not in conflict with the national law.

It must be further borne in mind that the act of Congress above quoted to you provides that if a record at all be made it shall contain a reference to some natural object or permanent monument object as will identify the claim.

Therefore if the record of a mining claim is made there is no authority or rule of law that can obviate the necessity of such notice referring to some natural object or permanent monument as to identify the claim.

Charged. J. L. L.

30 3rd. You are therefore instructed that a locator of a mining claim must distinctly mark and define the location upon the ground by proper stakes and monuments, so that the boundaries thereof can be readily traced; and if you find from the evidence that the Emma locators placed stakes at a distance of 2,300 feet apart to define the length of their claim, and that the notice of location does not conform thereto, or even if it does, that a location made so largely in excess of that allowed by law is of itself void and of no force and effect.

And furthermore that a subsequent survey of such claim without a readjustment of the boundaries or without any effort to mark or define the same according to law will not benefit the locators or remedy the defects of the original location.

A location of a mining claim made so largely in excess of that allowed by law is not a location in law at all; it is neither the marking or defining of the boundaries of a mining claim and no record thereof can make the same valid or binding.

Refused. J. L. L.

4th. You are further instructed that unless you find that the tract of ground now claimed as the Emma mining claim was itself marked and defined upon the ground from the first instance as the Emma mining claim, that the subsequent survey thereof does not make a valid location thereof.

Charged. J. L. L.

5th. You will furthermore observe that if there is a variance between the ground as staked, the ground as referred to in the notice of location, and the ground actually surveyed for a patent, all this presents a case of such vague uncertainty as to — null and void as against the Government or any one claiming under the Government by reason of another location valid of itself.

Refused. J. L. L.

6th. Marking the boundaries of a surface claim as required by the statute is one of the first steps towards a location. It serves a

double purpose. It operates to determine the right of the claimant as between himself and the general Government and to notify
31 third parties of the locator's rights. Another party seeking the benefits of the law going upon the ground is distinctly notified of the appropriation and can ascertain its boundaries. He may thus make his own location with certainty, knowing the boundaries of the other cannot be changed so as to encroach on ground duly appropriated prior to the change.

The prevention of frauds by swinging or floating is one of the purposes thus served.

The record also serves a double purpose as between the claimant and the Government. It preserves a memorial of the land appropriated after monuments, in their nature perishable, are swept away. It also supplements the surface marking in giving notice to third parties.

Charged. J. L. L.

7th. Where there is a variation of any considerable extent between the courses and distances of the location notice and the monuments placed upon the ground, the record, with its misdescription, in point of fact gives no notice of the ground actually located. Therefore you are instructed as a matter of law that if you find that the location notice of the Emma lode does not sufficiently refer to the same ground as actually staked, such notice, then, is of no force or effect and gives no notice to third parties claiming to locate the same ground.

Refused. J. L. L.

8th. A claimant who has not erected his boundary posts as the law requires will not be permitted to show the courses and distances of the recorded location that does not conform thereto where the rights of intervening locators without notice will be prejudiced.

Refused. J. L. L.

9th. The law of Congress under which the locations in controversy in this action were made requires that the location must be distinctly marked on the ground so that its boundaries can be readily traced, and the law of the Territory of Idaho in force at the time of the making of the location of these respective claims provides "that the locator of any lode mining claim must at the time of making the location place a substantial stake or post not less than four inches square or in diameter at each end of the ground claimed and as near as practicable along the course or line of the vein or ledge, and also a similar stake or post at each corner of the location.
32 Such stakes or posts must be at least four feet high above the surface and must each be marked distinctly with the name of the claim."

Refused. Already charged. J. L. L.

I therefore instruct you that if you find from the evidence that in marking the location of the Emma Lode claim upon the ground the locators thereof did not place a substantial stake or post at each

end of the ground claimed in the notice of location and as near as practicable along the course or line of the vein or ledge, and also a similar stake or post at each corner of the location as described in the notice of location or within such reasonable distance of such points that the boundaries of such claim could be readily traced upon the ground, then such location would be void.

Refused. J. L. L.

10th. And if you further find that on the 17th day of September, 1885, the locators of the Stemwinder Lode mining claim entered upon the premises claimed as the Stemwinder location and discovered therein a vein or lode of quartz or other rock in place bearing gold, silver, lead, or other valuable mineral, and located and claimed the premises described in the complaint as the Stemwinder Lode claim by posting in a conspicuous place at the point of the discovery and prospecting work on the claim a notice of location containing the date of the location, the name of the locator thereof, and the name of the claim, ledge, or lode, and the quantity of feet claimed along the ledge or lode, the width claimed from the middle of the vein, and such a description of the locality of the claim by reference to natural landmarks or fixed objects and contiguous claims, if there were any, as to render the situation reasonably certain from the letter of the notice itself and by marking the boundaries of said claim in accordance with the law as above stated, and that within fifteen days after such location the said locators of the said Stemwinder Lode claim filed a copy of said notice in the office of the deputy recorder of mining claims of Yreka mining district, and that said locators of the Stemwinder Lode claim or their grantees in interest have within each year since said location performed
33 one hundred dollars' worth of work upon said claim, and that the defendants has by mesne conveyances succeeded to the title of said locator- of the said Stemwinder Lode mining claim, then you shall find for the plaintiff.

Refused. J. L. L.

11th. I further instruct you, gentlemen of the jury, that the law of Congress requiring that the location of a mining claim shall be so marked that the boundaries can be readily traced upon the ground and the said law of Idaho Territory, above stated to you, describing what the stakes must be and where they shall be placed must be substantially complied with to constitute a valid location of a mining claim; that a mining claim under the law cannot exceed 1,500 feet in length along the vein or lode and 300 feet in width on each side of the centre of the vein or lode, and that where a mining claim of 1,500 feet in length and 300 feet in width on each side of the vein or lode is attempted to be located these stakes marking the boundaries must be placed at the points described by the law or near enough thereto so that any person honestly seeking to trace the boundaries of such claim might readily find them, and if they are not so placed the location will be void.

Refused. J. L. L.

12th. And if you find from the evidence that the boundary stakes marking the east end of the Emma Lode claim were placed at such a distance from the place where the law required them to be placed that a person seeking to trace the boundary of said claim upon the ground could not readily have found them, then you cannot find for the defendant.

Refused. J. L. L.

13th. When the right of possession to a mining claim is founded upon the alleged compliance with the laws relating to the valid location all the necessary steps aside from marking and recording the location notice must, when contested, be established by proof outside of such notice—

The record of a notice being proof in itself of its own performance of one of the steps in the location of a mining claim and, in regular order, the last step in perfecting the location, and the notice when recorded is competent evidence of what the statute requires such notices to contain and which are therein sufficiently set forth;
34 and even when the notice itself, *self* for any reason set forth in the statute, is deemed void it has been held admissable in connection with a valid amended location correcting the defects of the original notice.

Charged. J. L. L.

14th. And, unless some intervening right occurred or some pre-existing right of another, it follows that if an amended notice of location valid of itself is made to correct the defects of the original location, such additional notice serves the purposes of the original notice and relates back to the first location of the claim, the evident object and intent of the notice being to cure the defects in the original, and thereby to put the locator, where no other rights have intervened, in the same position that he would have been if no such defect had occurred in the original, and such intent is in perfect accord with the principles of all the provisions of the statute relating to mining claims.

Charged. J. L. L.

15th. The real question involved in this action upon adverse claims is, as each against the other, which has the better right to the possession of the mine or to mine the land in question. Each party must prove his claim to the premises in dispute and the better right must prevail. The right to mineral lands before a patent issues from the Government rests in the possession of the claimant. To constitute such possession as will give this right no residence on the premises or continued actual occupation is necessary.

Charged. J. L. L.

16th. Therefore if you find that the plaintiff has established its prior right by proof of the discovery of its grantor in and to the Stemwinder mining claim, worked and possessed the same in pursuance of the said notice, disclosing mineral in place, posting a notice and marking the surface boundaries and filing the original

notice of location, and that thereafter, after the discovery of the course of the vein, the plaintiff or its grantors has ascertained the true strike or course of the vein as located, and that to remedy the defects in the original they have filed their amended location making the boundaries conform to the course of the vein; and if you further find that the Emma location, under the instructions
35 given you, was void, or that they have never amended their location or marked or defined their ground in pursuance of the calls of the same, then you will find for the plaintiff, and that the plaintiff has the right to the possession of all and singular the premises embraced within the amended location in evidence.

Refused. J. L. L.

17th. As between two locators the boundaries — whose respective claims include the common territory, the priority of location confers the better title, provided a vein or mineral in place was discovered at the discovery shaft, and provided also that it extended to the ground in controversy, and that the location was properly marked and defined upon the ground either by the original location or an amended location and the marking and the defining of the boundaries in accordance therewith prior to any other intervening rights.

Charged. J. L. L.

18th. Under the law as it exists four things are necessary to be done in order to prove a location:

1st. The discovery of a vein or lode of mineral or rock in place bearing valuable metals.

2nd. The posting of a notice at the point of discovery or near or at some conspicuous portion on the claim, giving the name of the claim located and the name or names of the locators, the date of the discovery, and a description of the premises located by reference to natural objects or permanent monuments.

3rd. By marking the surface boundaries of the claim located by posts in a manner pointed out by the statutes.

4th. Making and recording a location notice containing the name and description of the lode, the name or names of the locators, and the date of the location. In case the claim so located is not properly marked and defined upon the ground, as required by the statute, it is incumbent upon the locator, in order to hold and possess and have the right of possession to such ground, to amend his location notice by an amended notice of location and properly mark the location upon the ground so that its boundaries can be readily traced.

A location notice is not a title or a proof of title nor does it constitute or establish the possessory right in issue and to which
36 it relates. It is purely a creature of the statute. Its functions and purposes are to give the world at large notice of the facts therein set forth when duly recorded and as one of the steps necessary to constitute a perfected mining location, and an amended or additional location upon the same ground, made with

the intent to remedy the defects in the original and filed according to the statute, is admissable in evidence and serves the same purpose as the original location notice and relates back to the first location of the claim.

The rule in actions such as the one now before you is that the parties must recover upon the strength of their own title-, respectively, and the one who has shown his compliance with the law.

Refused. J. L. L.

19th. A location of a mining claim is not made by taking possession alone, but by working upon the ground, recording and doing whatever else is required by the laws of Congress and of Idaho Territory, and among the most important of these requirements are the following, viz: The location must be distinctly marked upon the ground so that the boundaries thereof can be readily traced.

Refused. J. L. L.

20th. Now, if you find from the evidence that the location of the Emma lode was not so marked upon the ground that the boundaries thereof could be readily traced at the time of the original location thereof, and that the locators thereof or those claiming under them have not since made or attempted to amend such location or to relocate the same, then such location was and is void, and in that case it will be unnecessary for you to inquire as to the priority of the respective locations in controversy herein.

Refused. J. L. L.

21st. Among other things the law of Congress provides "that no location of a mining claim shall be made until a discovery of a vein or lode of quartz or other rock in place bearing gold, silver, or other precious metals within the limits of the claim located." And upon this question I instruct you that a discovery of a vein or lode within the limits of another mining claim previously located according to law is not such a discovery as the law requires. And if you find
37 that at the time of the location of the Emma mining claim the Stemwinder mining claim had been previously located according to law and was then held under such location, and that the discovery of the Emma claim was within the limits of the said Stemwinder claim, then the said Emma location would be void.

Charged. J. L. L.

22nd. If in making a location of a mining claim upon the ground the posts or monuments marking the exterior boundaries thereof should be so placed as to include more ground in length than the law allows, such location would be void only as to the excess [but this can only be the rule when the stakes or monuments are within such reasonable proximity to the place where the law requires they should be that they can be readily found or seen by a person attempting to trace the boundaries upon the ground]; but when the stakes or monuments are placed at so great a distance from where the law requires they should be that a person attempting to trace

the boundaries of the claim upon the ground could not readily find them, then such location is void altogether.

All in brackets and quotations refused. Balance charged. J. L. L.

Upon the jury returning into court and asking for further instructions the plaintiff requested the court to charge the jury as follows:

(23rd) 1st. Plaintiff requests the court to instruct the jury that a locator may locate 300 feet in width on each side of the centre of the vein, and that the question of where the centre of the vein is at the surface is a question of fact for the jury, and in the absence of proof as to where the centre of the vein is it will be presumed to be at the point of discovery; but if the proof shows that the centre of the vein is at a different point from the discovery, then the locator may hold 300 feet in width on each side of the centre of the vein as shown by the evidence if within the boundaries of the claim as marked upon the ground.

Refused. J. L. L.

(24th) No. 2. The jury are instructed that if they find that the locator of the Stemwinder located on a vein and it includes less than 1,500 feet on the vein, and that the vein is found to cross the location, then if the location is found to be so made, then the locator can take the vein to the limits of his side line as so located, wher-
38 ever it runs. 300 feet on each side of the vein means a measurement from the centre of the vein at any point within the location so made until it passes out of the exterior boundaries of the location.

Refused. J. L. L.

Endorsed: No. 282. The Stemwinder M'ng Co. *vs.* The Emma and Last Chance Con. M'ng Co. Plaintiff's requests. Filed September 29th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on the 29th day of September, A. D. 1888, defendants filed their requests, which *is* in words and figures as follows, to wit:

39 1st. The jury are instructed that the right of possession to mining lands depends upon a valid location; and if they believe that the plaintiff has failed to prove every act requisite to make a valid location they will find that the plaintiff has no title to the ground claimed as the Stemwinder mining claim.

2nd. A locator is not allowed to hold more than 300 feet on each side of the middle of his vein or lode; and if the jury find from the evidence that S. R. Devine included more than 300 feet within his stakes on the northerly side of the point of discovery at the time the notice was posted and his boundaries marked, his location is void as to the excess over 300 feet; and if such excess was originally included within the boundaries of the Emma location it belonged to

the Emma location, provided it appears in evidence that the Emma location was valid.

Charged. J. L. L.

3rd. If the jury find that the discovery of the Emma mining claim was made within such excess they will find that it was not made within the boundaries of the Stemwinder claim.

Charged. J. L. L.

4th. If the jury find that the locators and owners of the Stemwinder claim, together with the locators and owners of the Emma claim, made a joint measurement of the width of the surface ground of the Stemwinder mining claim lying to the northward of the discovery point, and measured a distance of 300 feet from such point of discovery at right angles with the general course of the location of the Stemwinder claim, and placed a monument at the end of the 300 feet from such point of discovery to mark the northern boundary of the Stemwinder claim, and, acting upon and in pursuance to such measurement and the placing of such monument, the defendants and plaintiffs consenting that the said monument should mark and determine the boundary line between the Emma mining claim and the Stemwinder mining claim, and that at the time of the official survey of the Emma mining claim for patent the then owners of the Stemwinder claim pointed out such monument to the U. S. deputy mineral surveyor as the boundary between the Emma and Stemwinder mining claims and as the north boundary of the said Stemwinder, and that in pursuance of such acts the U. S. deputy mineral surveyor adopted such line in making the official survey and the defendants made application for patent upon such survey, then the plaintiff and defendants are both bound by the adoption of such line.

Refused. J. L. L.

5th. If the jury find from the evidence that a location notice claiming the Emma lode was posted upon the claim after a discovery of rock in place bearing mineral therein prior to the posting of the notice upon the Stemwinder claim, you are then instructed that the claimants of the Emma lode under such notice of location would be protected in the possession of the surface ground claimed in such location notice — a reasonable period of time in which to mark the boundaries of the surface ground of their said claim, and that any location made subsequent thereto by the locator of another claim which overlapped the surface of such a prior location would be invalid to the extent of the area in conflict; and if you find that after the posting of the Emma location notice the boundaries thereof were marked by the locators within a reasonable time, and that the Stemwinder location was made after the Emma location, the Emma location would have a prior right.

It is for you to say from the evidence what is a reasonable time.

Charged. J. L. L.

6th. If the jury find from the evidence that the discovery point of the Stemwinder lode was changed a distance of 80 feet or thereabouts and the amended location of the Stemwinder lode adopted the point of discovery as so changed and located at right angles to the course of the location as originally claimed, this would be such a material change of the original location as to amount practically to a relocation, provided it interfered with the rights of any person who had made a valid location with which such change interfered.

Charged. J. L. L.

7th. The Stemwinder Mining Company is a corporation organized under the laws of the State of Oregon, and no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States.

Charged. J. L. L.

41 Upon the jury returning into court and asking for further instructions the defendants requested the court to charge the jury as follows:

1st. Def't asks court to limit the application of verbal instructions to ground in dispute. The Stemwinder may have been a valid prior location; but if it did not lawfully include ground in dispute, then the instruction as to priority would not apply.

Charged. J. L. L.

Endorsed: No. 282. The Stemwinder M. Co. *vs.* The Emma and Last Chance Con. M. Co. *et al.* Def'ts' requests. Filed September 29th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on the 29th day of September, A. D. 1888, the verdict of the jury was filed herein, which is in words and figures as follows, to wit:

42 (Title of Court and Cause.)

We, the jury in the above-entitled cause, find the right of possession to the area of ground in conflict in this action to belong to the defendants.

WILLIAM A. PARKER, *Foreman.*

Endorsed: No. 282. The Stemwinder M. Co. *vs.* The Emma and Last Chance Con. M. Co. *et al.* Verdict of jury. Filed September 29th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on the 29th day of September, A. D. 1888, being a day of said court, a journal entry was made herein, which is in the words and figures as follows, to wit:

43 Fifty-sixth Judicial Day, Saturday, September 29th, A. D. 1888, June Term, A. D. 1888.

THE STEMWINDER MINING COMPANY
vs.
THE EMMA AND LAST CHANCE CON. M'NG CO. *et al.* } No. 282.

At this day, all parties hereto being present in open court and the jury having been duly polled, the trial of this cause was resumed.

After the arguments of counsel the court charged the jury in writing and they were placed in charge of an officer duly sworn for that purpose and retired to consider of their verdict, and at this time by stipulation of counsel it was ordered that any bill of exceptions herein might be presented to the court and be filed during this term of court, and the jury regularly empannelled herein returned into court and, being duly polled, answer to their names and ask for further instructions, and after being duly instructed by the court they were placed in charge of an officer duly sworn for that purpose and again retired to consider of their verdict, and afterwards the jury returned into court with a verdict signed by their foreman, and, being called, answer to their names and say:

In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE STEMWINDER MINING COMPANY, a Corporation, Plaintiff,
vs.
THE EMMA AND LAST CHANCE CON. MIN. CO. *et al.*

We, the jury in the above-entitled cause, find the right of
44 possession to the area of ground in conflict in this action to belong to the defendants.

WILLIAM A. PARKER, *Foreman.*

The jury were then excused from the further consideration of this case.

And on motion of the plaintiff the court granted a stay of proceedings for ten days.

And afterwards and on the 5th day of October, A. D. 1888, a decree herein was filed, which is in the words and figures as follows, to wit:

45 (Title of Court and Cause.)

This cause came on regularly for trial. The said plaintiff appeared, by its attorneys, Albert Hagan and Albert Allen, Esquires, and the defendants by Woods & Heyburn, Esquires, its attorneys. A jury of twelve persons was regularly empannelled and sworn to try the said action; whereupon witnesses upon the part of the plaintiff and defendant were sworn and examined, and, after hearing the evidence and the arguments of counsel and the instructions of the court, the jury retired to consider of their verdict, and subsequently returned

into court with a verdict, signed by the foreman, and being called answer to their names and say:

"We, the jury in the above-entitled cause, find the right of possession to the area of ground in conflict in this action to belong to the defendant.

WILLIAM PARKER, *Foreman.*"

Wherefore, by reason of the law and by virtue of the premises aforesaid, it is ordered, adjudged, and decreed that the said defendant, The Emma & Last Chance Consolidated Mining Company, have the right of possession of the mining ground in controversy between said plaintiff and defendant and in said complaint described as follows, to wit: Beginning at a point, being corner No. 3 of the official survey of the Emma Lode claim, as the same was surveyed and marked upon the ground in the making of the official survey for a United States patent, thence north 82 degs. 23 mins. east 82.4 feet to a point on the north side line of the said Emma Lode claim as surveyed for patent; thence south 71 degs. 50 mins. east 534.9 feet to a point; thence south 11 degs. 58 mins. east 59.6 feet to a point on the south side line of the said Emma Lode claim, said point being south 80 degs. 40 mins. east 612.8 feet from corner No. 2 of said official survey of the Emma Lode claim; thence along the south side line of said Emma Lode claim north 80 degs. 40 mins. west 612.8 feet to corner No. 2 of the official survey of the said Emma Lode claim; thence north 1 deg. east 114 feet to the place of beginning, and containing an area of 1.38 acres of land, and that the same be adjudged and decreed to be a part of the said Emma Lode claim, as the same was located and claimed by Jno. Flaherty, J. L. Smith, M.
46 Carlin, and John M. Burke on the 17th day of September, 1885, and that the right of possession to all of said Emma Lode claim as surveyed for a patent and described in the application for patent belongs to the defendant in this action, and that the defendant have and recover of and from said plaintiff its costs and disbursements in this action, amounting to the sum of $1,141.30.

JOHN L. LOGAN, *Judge.*

A true copy.

Attest my hand and the seal of said district court this 5th day of October, A. D. 1888.

F. H. GRIERSON, *Clerk,*

[SEAL.] By BARRY N. HILLARD, *Deputy.*

Endorsed: No. 282. In district court, Shoshone county, Idaho Ter. The Stemwinder M'g Co. *vs.* The Emma & Last Chance Con. M'g Co. *et al.* Decree. Filed October 5th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on October 5th, 1888, the certificate to the judgment-roll was filed herein, which is in words and figures as follows, to wit:

47 (Title of Court and Cause.)

I, the undersigned, clerk of the district court of the first judicial district of said Territory in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action and recorded in Judgment Book "B" of said court, on page 47, and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said action.

Witness my hand and the seal of the district court this 5th day of October, 1888.

F. H. GRIERSON, *Clerk*,
[SEAL.] By BARRY N. HILLARD, *Deputy*.

Endorsed: No. 282. District court of the first judicial district, county of Shoshone. The Stemwinder Mining Company, plaintiff, *vs.* The Emma and Last Chance Con. M'ng Co. *et al.*, defendants. Judgment-roll. Filed October 5th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy clerk.

And afterwards and on October 5th, 1888, the following journal entry was made herein in words and figures as follows, to wit:

48 Sixtieth Judicial Day, October 5th, A. D. 1888, June Term, A. D. 1888.

THE STEMWINDER MINING COMPANY, Plaintiff,
vs.
THE LAST CHANCE AND EMMA CON. M'NG CO. *et al.* } No. 282.

At this day, all parties hereto being present in open court, it is agreed by counsel for the respective parties, plaintiff and defendant, that the plaintiff do have until the 20th day of October to prepare, file, and serve its statement on motion for a new trial herein, and that defendants have thirty days from the 20th of October, 1888, to file and serve their amendments and counter-affidavits to said statement.

Plaintiff's motion herein that the entering of judgment be stayed, heretofore argued and submitted, was by the court denied, and ordered that a stay of proceedings be granted herein until the hearing and disposition of the motion for a new trial herein.

And afterwards and on the 5th day of October, A. D. 1888, the plaintiff filed a bill of exceptions, which is in words and figures as follows, to wit:

49 (Title of Court and Cause.)

Exceptions.

Be it remembered that on this 29th day of September, 1888, upon the trial of the above-entitled action, the plaintiff and defendants having rested their case and the arguments of counsel having been made, the court, at the request of the plaintiff, gave to the jury the following instructions:

1st.

By the act of Congress which took effect May 10, 1872, "all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase by citizens of the United States and those who have declared their intentions to become such under the regulations prescribed by law and according to the local customs and rules of miners in the several mining districts, as well as the territorial laws, so far as the latter are applicable and not inconsistent with the laws of the United States." Both of the locations at bar were made, if at all, subsequent to the passage of that act of Congress, and therefore whatever rights either of the parties acquired have been acquired by the force of that act of Congress known as the mining law of May 10th, 1872, and the local territorial laws, so far as they are applicable and not inconsistent with national law. Under the act of Congress referred to and under the territorial law also the locator is authorized to locate a claim not more than 1,500 feet in length along the vein or lode; and it is further provided that no claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulations to less than 25 feet on each side of the middle of the vein at the surface.

These words I quote from the statute itself, and in the absence of a mining rule or custom in force at the time a location is made at the place where it is made the location may extend to the distance of 300 feet on each side of the middle of the vein at the surface—that is to say, the claim may be 1,500 feet in length along the vein by 600 feet in width, including 300 feet on each side of the middle of the vein, and no locator can claim to hold any more than is given to him by reason of the laws to which I have referred; "1,500 feet along the vein" are the words of the statute, and "300 feet on each side of the middle of the vein" seems to limit the amount of land that can be located in any one mining location.

There is no pretense or claim in this case that there was any mining rule or custom in force in the Yreka mining district, at the time these locations were made, other than the national and territorial laws to which I have referred, and therefore you have no custom or rule established and in force in the district to consider in making up your verdict in this case.

You are further instructed, gentlemen of the jury, that by the act of Congress it is provided that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located. So you will perceive that no rights can be acquired under the statute by a location made before the discovery of a vein within the limits located. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or some kind of rock in place carrying gold, silver, or other valuable mineral deposits named in the statutes; but it is necessary, at all events, that the locator should discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of

discovery within the limits of the claim located, in order to entitle the miner to make a valid location to include such vein or lode.

2nd.

The Government gives its lands to those citizens who may discover precious metal ores therein upon the condition that the locators will define the subject of the grant—in other words, the mining location—with such certainty as may be necessary to prevent mistakes on the part of the Government or on the part of other citizens who may be asking a like privilege.

This is reasonable and necessary to justly administer
51 the law, and therefore it may be laid down as a general proposition of law that without a description of the premises in the notice of location the location will be void.

It is well here for the court to instruct you first as to the actual wording of the statute of the United States and the territorial law both regarding the location of a mining claim, so that there can be no mistake in the minds of the jury as to the mining law or the instructions the court will give you.

Section 2324 of the Revised Statutes of the United States provides, among other things, that the location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily traced, and all records of mining claims hereafter made will contain the name or names of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.

Supplemental to that act is the act of the territorial Legislature of Idaho, section 3101 of the Revised Statutes of Idaho, which provides that the locator of any lode mining claim must, at the time of making the location, place a substantial stake or post not less than four inches square or diameter at each end of the ground claimed and as near as practicable along the course or line of the vein or ledge, and also a similar stake or post at each corner of the location. Such stakes or posts must be at least four feet high above the surface and must each be marked distinctly with the name of the claim, and the notice of the location hereinafter mentioned must be conspicuously attached to one of said centre end posts so that the same can be easily read. Section 3102 of the Revised Statutes of Idaho says the notice must contain the date of location, the names of the locators, the name of the claim, ledge, or lode, the quantity of feet claimed along the ledge or lode, the width claimed from the middle of the vein, and must also give such a description of the locality of the claim by reference to natural landmarks or fixed objects and contiguous claims, if there be any, as to render the situation of the same reasonably certain from the letter of the notice itself.

52 It will thus be observed that while the act of Congress of May 10th, 1872, does not make it obligatory to record notices of location, the statutes of Idaho does, and therefore is not in conflict with the national law. It must be farther borne in mind that the act of Congress above quoted to you provides that if a rec-

ord at all be made it shall contain a reference to some natural object or permanent monument as will identify the claim. Therefore if a record of a mining claim is made there is no authority or rule of law that can obviate the necessity of such notice referring to some natural object or permanent monument as to identify the claim.

4th.

You are further instructed that unless you find that the tract of ground now claimed as the Emma mining claim was itself marked and defined upon the ground in the first instance as the Emma mining claim, that the subsequent survey thereof does not make a valid location thereof.

6th.

Marking the boundaries of the surface claim, as required by the statutes, is one of the first steps toward a location. It serves a double purpose: It operates to determine the right of the claimant as between himself and the General Government and to notify third parties of the locator's rights. Another party seeking the benefits of the law going upon the ground is distinctly notified of the appropriation and can ascertain its boundaries. He may thus make his own location with certainty, knowing the boundaries of the other cannot be changed so as to encroach on ground duly appropriated prior to the change. The prevention of frauds by swinging or floating is one of the purposes thus served. The record also serves a double purpose as between the claimant and the Government. It preserves a memorial of the lands appropriated after monuments, in their nature perishable, are swept away. It also supplements the surface marking in giving notice to third parties.

13th.

When the right of possession to a mining claim is founded upon the alleged compliance with the laws relating to a valid location all the necessary steps aside from marking and recording the location notice must, when contested, be established by proof outside of such notice, the record of the notice being proof in itself of its own performance of one of the steps in the location of a mining claim and, in regular order, the last step in perfecting the location, and the notice, when recorded, is competent evidence of what the statute requires such notices to contain and which are therein sufficiently set forth; and even when the notice itself for any reason set forth in the statute is deemed void, it has been held admissable in connection with a valid amended location correcting the defects of the original notice.

53

14th.

And, unless some intervening right occurred or some pre-existing right of another, it follows that if an amended notice of location, valid of itself, is made to correct the defects of the original location, such additional notice serves the purposes of the original notice and relates back to the first location of the claim, the evident

object and intent of the notice being to cure the defects of the original, and thereby to put the locator, where no other rights have intervened, in the same position he would have been if no such defect had occurred in the original, and such intent is in perfect accord with the principals of all the provisions of the statutes relating to mining claims.

15th.

The real question involved in this action upon adverse claims is, as each against the other, Which has the better right to the possession of the mine or to mine the land in question? Each party must prove his claim to the premises in dispute, and the better right must prevail. The right to mineral lands before a patent issues from the Government rests in the possession of the claimant. To constitute such possession as will give this right, no residence on the premises or continued occupation is necessary.

54 17th.

As between two locators, the boundaries — whose respective claims include the common territory, the priority of location confers the better title, provided a vein or mineral in place was discovered at the discovery shaft, and provided also that it extended to the ground in controversy, and that the location was properly marked and defined upon the ground either by the original location or an amended location and the marking and defining of the boundaries in accordance therewith prior to any other intervening rights.

21st.

Among other things, the law of Congress provides that "No location of a mining claim shall be made until the discovery of a vein or lode of quartz or other rock in place bearing gold, silver, or other precious metals within the limits of the claim located;" and upon this question I instruct you that a discovery of a vein or lode within the limits of another mining claim previously located according to law is not such a discovery as the law requires; and if you find that at the time of the location of the Emma mining claim the Stemwinder mining claim had been previously located according to law and was then held under such location, and that the discovery of the Emma claim was within the limits of the said Stemwinder claim, then the said Emma location would be void.

55 Be it further remembered that at the same time, upon the trial of said action, the following proceedings were had, viz:

The plaintiff requested the court, among other things, to give to the jury the following instructions, viz:

"You are therefore instructed that a locator of a mining claim must distinctly mark and define the location upon the ground by proper stakes and monuments, so that the boundaries thereof can be readily traced, and if you find from the evidence that the Emma locators placed stakes at a distance of 2,300

feet apart to define the length of their claim, and that the notice of location does not conform thereto, or even if it does, that a location made so largely in excess of that allowed by law is of itself void and of no force and effect; and, furthermore, that a subsequent survey of such claim without a readjustment of the boundaries or without any effort to mark or define the same according to law will not benefit the locators or remedy the defects of the original location. A location of a mining claim made so largely in excess of that allowed by law is not a location in law at all; it is neither the marking -or the defining of the boundaries of a mining claim, and no record thereof can make the same valid or binding."

Which instruction the court refused to give; to which refusal the plaintiff excepts then and there.

The plaintiff also requested the court to give the following instruction to the jury, being the 5th paragraph of plaintiff's instructions, viz: "You will, furthermore, observe that if there is a variance between the ground as staked, the ground as referred to in the notice of location, and the ground actually surveyed for a patent, all this presents a case of such vague uncertainty as to be null and void as against the Government or any one claiming under the Government by reason of another location valid of itself."

Which instruction the court refused to give; to which refusal the plaintiff excepts.

56 The plaintiff also requested the court to give the following instruction to the jury, being the 7th paragraph of plaintiff's instructions, viz:

"Where there is a variation of any considerable extent between the courses and distances of the location notice and the monuments placed upon the ground, the record, with its misdescription, in point of fact gives no notice of the ground actually located. Therefore you are instructed as a matter of law that if you find that the location notice of the Emma lode does not sufficiently refer to the same ground as actually staked, such notice, then, is of no force or effect and gives no notice to third parties claiming to locate the same ground."

Which instruction the court refused to give; to which the plaintiff excepts.

The plaintiff also requested the court to give the following instruction, being paragraph 8th of plaintiff's instructions, viz:

"A claimant who has not erected his boundary posts as the law requires will not be permitted to show the courses and distances of a recorded location that does not conform thereto, where the rights of intervening locators without notice will be prejudiced."

Which instruction the court refused to give; to which the plaintiff excepts.

The plaintiff also requested the court to give the following instruction to the jury, being paragraph 9th of plaintiff's instructions, viz:

The law of Congress under which the location- in controversy in this action were made requires that the location must be distinctly

marked upon the ground, so that its boundaries can be readily traced; and the law of the Territory of Idaho in force at the time of the making of the locations of these respective claims provides "that the locator of any lode mining claim must, at the time of making the location, place a substantial stake or post not less than four inches square or in diameter at each end of the ground claimed and as near as practicable along the course or line of the vein
57 or ledge, and also a similar stake or post at each corner of the location. Such stakes or posts must be at least four feet high above the surface and must each be marked distinctly with the name of the claim." I therefore instruct you that if you find from the evidence that in marking the location of the Emma Lode claim upon the ground the locators thereof did not place a substantial stake or post at each end of the ground claimed in the notice of location and as near as practicable along the course or line of the vein or ledge, and also a similar stake or post at each corner of the location as described in the notice of location or within such reasonable distance of such points that the boundaries of such claim could be readily traced upon the ground, then such location would be void."

Which instruction the court refused to give; to which refusal the plaintiff excepts.

The plaintiff requested the court to give the following instruction to the jury, being paragraph 10th of the plaintiff's instructions, viz:

"And if you further find that on the 17th day of September, 1885, the locators of the Stemwinder Lode mining claim entered upon the premises claimed as the Stemwinder location and discovered therein a vein or lode of quartz or other rock in place bearing gold, silver, lead, and other valuable mineral and located and claimed the premises described in the complaint as the Stemwinder Lode claim by posting in a conspicuous place at the point of discovery and prospecting work upon the claim a notice of location, containing the date of location, the name of the locators thereof, and the name of the claim, ledge, or lode, and the quantity in feet claimed along the ledge or lode, the width claimed from the middle of the vein, and such a description of the locality of the claim by reference to natural landmarks or fixed objects and contiguous claims, if there were any, as to render the situation reasonably certain from the letter of the notice itself and by marking the boundaries of said claim in accordance with the law as above stated, and that within fifteen days after such location the said locators of said Stemwinder Lode
58 claim filed a copy of said notice in the office of the deputy recorder of mining claims of Yreka mining district, and that said locators of said Stemwinder Lode mining claim or their grantees in interest have within each year since said location performed one hundred dollars' worth of work upon said claim, and that the plaintiff has by mesne conveyances succeeded to the title of said locator of the said Stemwinder Lode mining claim, then you shall find for the plaintiff."

Which instruction the court refused to give; to which the plaintiff excepts.

The plaintiff also requested the court to instruct the jury as follows, being the 11th paragraph of plaintiff's instructions, viz:

"I further instruct you, gentlemen of the jury, that the law of Congress requiring that the location of a mining claim shall be so marked that the boundaries can be readily traced upon the ground and the said law of Idaho Territory above stated to you describing what the stakes must be and where they shall be placed must be substantially complied with to constitute a valid location of a mining claim; that a mining claim under the law cannot exceed 1,500 feet in length along the vein or lode and 300 feet in width on each side of the centre of the vein or lode, and that where a mining claim of 1,500 feet in length and 300 feet in width on each side of the vein or lode is attempted to be located these stakes marking the boundaries must be placed at the points described by law or near enough thereto so that any person honestly seeking to trace the boundary of such claim might readily find them; and if they are not so placed the location will be void."

Which instruction the court refused to give; to which ruling the plaintiff excepts.

Plaintiff also requested the court to give the following instruction, being the 12th paragraph of plaintiff's instructions, viz:

"And if you find from the evidence that the boundary stakes marking the east end of the Emma Lode claim were placed at such a distance from the place where the law required them to be
59 placed that a person seeking to trace the boundaries of said claim upon the ground could not have readily found them, then you cannot find for the defendant."

Which instruction the court refused to give; to which the plaintiff excepts.

The plaintiff requested the court to give the following instruction, being the 16th paragraph of plaintiff's instructions, viz:

"Therefore, if you find that the plaintiff has established its prior right by a proof of a discovery of its grantor in and to the Stemwinder mining claim, worked and possessed the same in pursuance of said notice, disclosing mineral in place, posting a notice and marking the surface boundaries, and filing the original notice of location, and that thereafter, after the discovery of the course of the vein, the plaintiff or its grantors has ascertained the true strike or course of the vein as located, and that to remedy the defects in the original they have filed their amended location, making the boundaries conform to the course of the vein; and if you further find that the Emma location, under the instructions given you, was void, or that they have never amended their location or marked or defined their ground in pursuance of the calls of the same, then you will find for the plaintiff, and that the plaintiff has the right to the possession of all and singular the premises embraced within the amended location in evidence."

Which instruction the court refused to give; to which the plaintiff excepts.

Plaintiff also requested the court to give the following instruction, being paragraph 18th of plaintiff's instructions, viz:

"Under the law as it exists four things are necessary to be done in order to prove a location:

1st. The discovery of a vein or lode of mineral or rock in place bearing valuable minerals.

2nd. The posting of a notice at the point of discovery ar near or at some conspicuous portion of the claim, giving the name of the claim located, the name or names of the locators, the date of the discovery, and a description of the premises located by reference
60 to natural objects or permanent monuments.

3rd. By marking the surface boundaries of the claim located by posts in a manner pointed out by the statutes.

4th. Making and recording a location notice containing the name and a description of the lode, the name or names of the locators, and the date of location. In case the claim so located is not properly marked and defined upon the ground as required by the statute, it is incumbent upon the locator, in order to hold and possess and have the right of possession to such ground, to amend his location notice by an amended notice of location, and properly mark the location upon the ground so that its boundaries can be readily traced. A location notice is not a title or a proof of title, nor does it constitute or establish the possessory right in issue and to which it relates. It is purely a creature of the statute; its functions and purposes are to give the world at large notice of the facts therein set forth when duly recorded, and as one of the steps necessary to constitute a perfected mining location; and an amended or additional location upon the same ground, made with the intent to remedy the defects in the original and filed according to the statute, is admissable in evidence and serves the same purpose as the original location notice and relates back to the first location of the claim. The rule in actions such as the one now before you is that the parties must recover upon the strength of their own title respectively, and the one who has shown his compliance with the law."

Which instruction the court refused to give; to which the plaintiff excepts.

The plaintiff further requested the court to give the following instruction, being paragraph 19th of plaintiff's instructions, viz:

"A location of a mining claim is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required by the law of Congress and of Idaho Territory, and among the most important of these requirements are the following: The location must be distinctly marked upon the ground, so that the boundaries thereof can be readily traced."

61 Which instruction the court refused to give; to which the plaintiff excepts.

The plaintiff also requested the court to give the following instruction, being paragraph 20th of plaintiff's instructions, viz:

"Now, if you find from the evidence that the location of the Emma lode was not so marked upon the ground that the boundaries thereof could be readily traced at the time of the original location thereof, and that the locators thereof or those claiming under them have not since made or attempted to amend such location or

to relocate the same, then such location was and is void, and in that case it will be unnecessary for you to inquire as to the priority of the respective locations in controversy herein."

Which instruction the court refused to give; to which the plaintiff excepts.

The plaintiff requested the court to give the following instruction to the jury, being paragraph 23rd of plaintiff's instructions, viz:

"If in marking the location of a mining claim upon the ground the posts or monuments marking the exterior boundaries thereof should be so placed as to include more ground in length than the law allows, such location would be void only as to the excess; but this can only be the rule where the stakes or monuments are within such reasonable proximity to the place where the law requires them to be placed that they can be readily found or seen by a person attempting to trace the boundaries upon the ground; but when the stakes or monuments are placed at so great a distance from where the law requires they should be that a person attempting to trace the boundaries of the claim upon the ground could not readily find them, then such location is void altogether."

Which instruction the court refused to give; to which ruling of the court plaintiff excepts.

62 The court, at the request of the defendant-, gave to the jury the following instruction, being the first instruction asked by defendant-, as follows:

First. The jury are instructed that the right of possession to mining lands depends upon a valid location, and if they believe that the plaintiff has failed to prove every act requisite to make a valid location they will find that the plaintiff has no title to the ground claimed as the Stemwinder mining claim.

To which instruction and the giving thereof the plaintiff excepts.

The court, at the request of the defendants, gave the following instruction, being the second instruction requested by the defendant-, viz:

"A locator is not allowed to hold more than 300 feet on each side of the middle of his vein or lode, and if the jury find from the evidence that S. R. Devine included more than 300 feet within his stakes on the northerly side of the point of discovery at the time the notice was posted and his boundaries marked, his location is void as to the excess over 300 feet, and if such excess was originally included within the boundaries of the Emma location it belonged to the Emma location, provided that it appears in evidence that the Emma location was valid."

To which instruction and the giving thereof the plaintiff excepts.

The court, at the request of the defendant-, gave the jury the following instruction, marked 3rd of defendants' instructions, viz:

"If the jury find that the discovery of the Emma mining claim was made within such excess, they will find that it was not made within the boundaries of the Stemwinder claim."

To the giving of which instruction, as also to the instruction, the plaintiff excepts.

The court, at the request of the defendant-, gave to the jury
63 the following instruction, being instruction marked 5th of the defendants' instructions, namely:

"If the jury find from the evidence that a location notice claiming the Emma lode was posted upon the claim after the discovery of rock in place bearing mineral therein prior to the posting of the notice on the Stemwinder claim, you are then instructed that the claimants of the Emma lode under such notice of location would be protected in the possession of the surface ground claimed in such location notice a reasonable period of time in which to mark the boundaries of the surface ground of their said claim, and that any location made subsequent thereto by the locator of another claim which overlapped the surface of such prior location would be invalid to the extent of the area in conflict; and if you find that after the posting of the Emma location notice the boundaries thereof were marked by the locator within a reasonable time, and that the Stemwinder location was made after the Emma location, the Emma location would have the prior right" (with the additional instruction in the handwriting of the judge).

"It is for you to say from the evidence what is a reasonable time."

To which instruction and the giving thereof the plaintiff excepts.

The court, at the request of the defendant-, instructed the jury as follows, viz., being instruction marked 6th of defendants' instructions:

"If the jury find from the evidence that the discovery point of the Stemwinder lode was changed a distance of 80 feet or thereabouts, and the amended location of the Stemwinder lode adopted the point of discovery as so changed and located at right angles to the course of the location as originally claimed, this would be such a material change of the original location as to amount practically to a relocation, provided it interfered with the rights of any person who had made a valid location with which such change interfered."

To which instruction and the giving thereof the plaintiff excepts.

64 The court, at the request of the defendant-, instructed the jury as follows, being instruction marked 7th of instructions, viz:

"The Stemwinder Mining Company is a corporation organized under the laws of the State of Oregon, and no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States."

To the giving of which instruction the plaintiff excepts.

And be it further remembered that after reading to the jury the foregoing written instructions the court addressed the jury orally, as follows:

"In addition to what I have read to you, I wish to add a few remarks merely as to your duty as jurors. You may have ever so much knowledge about mining law and know all about customs and mining rules and regulations, but though you have the wisdom of Solomon they have nothing to do with your deliberations. You

are sworn to decide the case on the evidence, and all of your knowledge, however accurate it may be, has nothing to do with this case. You must go according to the law and the evidence in the case. I have stated the law to you very plainly, as it seems to me, as to what constitutes a valid location, and I shall further charge you this: that there is really but one question in this case. The whole case is practically limited to that question—that is, who first made a valid location on this ground; that is really the whole question, stripped of the evidence and stripped of all the facts of the case; that is the point. Now, to determine that point you must go into all the evidence you have heard; reconcile it, if you can, and ascertain, if you can, who, in your judgment, to the best of your belief, first located—made a valid location—upon that ground. If you find that the plaintiff made the first valid location, the plaintiff is prior in point of time, and whatever may be all the facts in this case—I do not care what they are—the plaintiff is entitled to a verdict at your hands. If you find, however, that the defendant made the first valid location, then the defendant is entitled to a verdict at your hands.

65 I state that to you so as to simplify the case and bring it down to the direct point in issue.

Of course, I do not take from you the facts in the case. I do not take from you the evidence that has been given before you, but on those facts you will find a verdict, bearing in mind your duty as jurors.

You have a right in this case to find that neither party is entitled to a verdict; that the property is really in the United States; and if you come to an honest conclusion to that effect you will have to so alter the form of this form of verdict given you as to accord with that conclusion.

I now hand you a form of verdict which, when you have agreed, you can fill up and sign.

66 At 3 o'clock p. m. of September 29th, the jury having come into court desiring further instructions, the following proceedings took place:

Juror GRAHAM: Your honor, there seems to be some misunderstanding in regard to the instructions of the court—in regard to the vital point of the court's instructions.

Juror WEBER: The last two instructions seems to be the only points in issue.

The COURT: Do you mean the ones that I gave you from the paper or that I gave you verbally?

Juror WEBER: From the paper and the verbal ones.

Juror SAGE: After we decide as to which was the first location, then this is the point with me. After we have decided as to which is the first location, then are we not to allow no more than three hundred feet on each side of the discovery shaft or of the vein? That is the only point with me.

The COURT: The act of Congress says that the locator is entitled to locate a claim of not more than one thousand five hundred feet in length along the vein or lode, and it is further provided that no

claim shall extend more than three hundred feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface.

The location may extend to a distance of three hundred feet on each side of the middle of the vein at the surface. That is as far as the location may extend—fifteen hundred feet along the claim and three hundred feet in width on each side of the middle of the vein; but no locator can claim to hold more than three hundred feet in width by reason of the laws to which I have referred. I hardly know what else I can say. That is the plain reading of the statute.

Juror SAGE: Do you mean the middle of the vein or the discovery shaft. That is what I want to be instructed upon.

The COURT: The point is this: at the time of the location, the measurement must be from the point of discovery—the middle of the point of discovery—unless there is evidence before you that the vein has actually been established and run; but if
67 the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery; and they must be entitled to 300 feet on each side of the middle of the vein at the point of discovery. It must not exceed three hundred feet—that is, they are entitled to 300 feet on each side of the vein. I stated to you—at least I will state to you, now you have asked me the question—that I stated to you this morning, to the best or my recollection, that the real question at issue in this case is who made the first valid location according to the law, as I stated it to you, on this ground—on these claims you have heard the evidence about. Whoever made the first valid location and have the right as in point of time first, if you find that the location is valid otherwise, in every respect, would be entitled to the verdict.

By JUROR:

Q. Is that supposed to govern all the other instructions?
A. Oh no; only in part.

To which instructions by the court and conversations in the presence of the jury the plaintiff excepts and now assigns as error.

And, furthermore, when the jury was so in court, the court gave to the jury the following instruction asked for by the defendant-, to wit:

"Defendant- asks the court to limit the application of verbal instruction to the ground in dispute—you understand that—to the ground in dispute between these two mines. The Stemwinder may have been the prior valid location; but if it did not lawfully include ground in dispute, then the instruction as to priority would not apply. You understand that."

To which instruction and the giving thereof by the court the plaintiff excepts.

Whereupon the plaintiff requested the court to instruct the jury before they retired the second time, as follows:

68 "Plaintiff requests the court to instruct the jury that a location may locate 300 feet in width on each side of the centre of the vein, and that the question of where the centre of the vein is, at the surface, is a question of fact for the jury, and in the absence of proof as to where the centre of where the vein is, it will be presumed to be at the point of discovery; but if the proof shows that the centre of the vein is at a different point from the discovery, then the locator may hold 300 feet in width on each side of the centre of the vein, as shown by the evidence, if within the boundaries of the claim as marked upon the ground."

Which request the court refused and to which refusal the plaintiff excepts.

And then and there the plaintiff asked the court to give to the jury the further instructions as follows, to wit:

The jury are instructed that if they find that the locator of the Stemwinder located on a vein and it includes less than 1,500 feet on the vein, and that the vein is found to cross the location, then if the location is found to be so made the locator can take the vein to the limits of his side lines as so located, wherever it runs. 300 feet on each side of the vein means a measurement from the centre of the vein at any point within the location so made until it passes out of the exterior boundaries of the location.

Which instruction the court refused to give; to which refusal the plaintiff excepts.

And at the request of the plaintiff the above and foregoing its exceptions, taken at the trial, are hereby settled and signed and hereby ordered to be filed and made a record in this cause; and I further certify that the within and foregoing bill of exceptions contains all the instructions given by the court to the jury.

By the court.

JOHN L. LOGAN, *Judge.*

69 Endorsed: No. 282. District court, Shoshone county. The Stemwinder Mining Company *vs.* John M. Burke *et al.* Plaintiff's exceptions taken at the trial. Filed October 5th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on October 5th, A. D. 1888, the following stipulation was filed herein in words and figures as follows, to wit:

70 (Title of Court and Cause.)

By agreement of counsel in open court it is stipulated, and so ordered by the court, that the plaintiff have to include the 20th day of October, 1888, to make, send, and file its statement on motion for a new trial, its affidavits to be used on motion for a new trial, its motion for new trial, and motion for judgment "*non obstante ver-dicto.*"

That defendants have until to include November 20th, 1888, to prepare and send amendments to plaintiff's statement and counter-affidavits; and it is ordered that execution herein be stayed until

the hearing and determination or other disposition of the motion for a new trial herein.

Oct. 5th, 1888.

JOHN L. LOGAN, *Judge.*

Endorsed: No. 282. Stemwinder Min'g Co. *vs.* The Emma and Last Chance Con. Mi'g Co. Order. Stipulation. Filed October 5th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on the 15th day of October, A. D. 1888, the plaintiff filed a second bill of exceptions, which is in words and figures as follows, to wit:

71 (Title of Court and Cause.)

Bill of Exceptions Taken During the Progress of the Trial of the Above-Entitled Cause.

Be it remembered that on the — day of September, 1888, the above-entitled action came on for trial in said court; whereupon a jury was empannelled and sworn and the trial proceeded before a jury.

Whereupon REES PRICE, a witness sworn upon the part of the plaintiff, is being interrogated, when, after having testified that he knew the Stemwinder mining claim, and that he went upon the claim on the 18th day of September, 1885, as near as he could remember, with S. R. Devine, the alleged location thereof, to examine the same and the discovery point thereof, and that he saw at such point galena ore in place, and was with S. R. Devine at the time, witness was then asked the question:

Q. Did he (Devine) at this time point out to you any notice on the claim?

Which question was objected to by the defendants as leading. Court sustained the objection; to which ruling of the court the plaintiff then and there excepted.

Said witness was then and there asked the further question:

Q. Did he (Devine) point out to you anything on the claim there?

Objected to by the defendants as leading and immaterial. Objection sustained by the court; to which ruling of the court plaintiff then and there excepted.

And while the same witness was yet on the stand being examined, and having testified to having seen a notice on the Stemwinder mining claim on said day, — was then and there asked the following question:

Q. Whose name did you see on that notice?

Which question being objected to by counsel for defendants as incompetent to prove contents of notice without showing its loss, the objection was sustained by the court; to which ruling the plaintiff then and there excepted.

And said witness was asked the further question in this connection:

72 Q. Was there a name of a mine on it?
A. Yes.
Q. What name did it contain?

Objected to by the defendant as incompetent. Objection sustained by the court; to which ruling plaintiff excepted.

And witness, having testified that he read the notice and knew some of the contents, was further asked the following question in this connection:

Q. What did that notice contain, so far as you remember it and ascertained from reading it?

Objected to by counsel for the defendants as incompetent. Objection sustained by the court; to which ruling plaintiff then and there excepted.

And thereafter during said trial JOHN KING was introduced and sworn as a witness upon the part of plaintiff, and, having testified that he was on the Stemwinder mining claim on about September 22nd, 1885, and saw S. R. Devine, the alleged locator, there on the ground, John King was asked the following question:

Q. So you know who was the locator of the Stemwinder?

Which question was objected to by counsel for defendants on the ground that it must first be proven that it was located, and as incompetent. Objection sustained; to which ruling of the court the plaintiff then and there excepted.

And the further question was then asked of said witness:

Q. Do you know the name of the original locator of the Stemwinder mining claim?

Objected to by defendant for same reason as last objection, and the objection sustained by the court; to which ruling of the court the plaintiff then and there excepted.

And the same witness, after having testified that he then on said day saw a post and a notice in writing, which he read, upon it about 30 or 40 feet from where S. R. Devine, the alleged locator of the Stemwinder, was working upon a deposit of galena ore, was then asked the following question:

Q. What did that notice purport to be?

Which was objected to by defendants' counsel as incom-
73 petent. Objection was sustained by the court; to which ruling of the court plaintiff's counsel then and there excepted.

Q. Now I will ask you what name you saw appended to the notice you saw on the stake.

Objected to by defendants' counsel as incompetent, and said objection sustained; to which ruling of the court plaintiff then and there excepted. Whereupon witness further testified that about a week or ten days after said 22nd day of September, 1885, he returned to the same place on the Stemwinder claim and then saw another notice thereon, written in pencil on a stake at or about the same place, and the first notice had disappeared and was not on the stake, and that it read about the same as the first one he saw; that he read the name signed to the notice; also the name of the mine, the date, etc.; and was then asked the following question:

Q. Will you state what name was attached to that notice, the last one you saw?

Which question was objected to by defendants' counsel as incompetent, and the objection sustained by the court; to which ruling of the court the plaintiff's counsel then and there excepted.

GEORGE B. MCAULAY, a witness upon the part of plaintiff, being duly sworn, and while on the stand having testified to having seen a notice of location, written in pencil upon a stake, on the Stemwinder claim, and at or near the discovery point thereof, and that when he last saw it the writing was obliterated and not legible, having faded out, and being shown the notice of location of the Stemwinder claim as recorded and upon record in the county recorder's office of said county, was asked by plaintiff the following question:

Q. Did you ever see a duplicate or copy of this notice (the record then shown witness) on the Stemwinder mining claim?

Counsel for defendants objected to this question as incompetent and as seeking to show contents of notice on claim. Objection sustained by the court; to which ruling of the court the plaintiff then and there excepted.

74 VAN B. DE LASHMUTT, a witness on the part of plaintiff, being duly sworn, *and* while being examined testified that he was a citizen of the United States and he was a stockholder in plaintiff's company and had been president of the Stemwinder Mining Company since its formation, and was asked the following question:

Q. How many shares of the capital stock of The Stemwinder Mining Company, pl'ff, do you own?

Question objected to by counsel for defendants as immaterial. Objection sustained by the court; to which ruling of the court pl'ff then and there excepted.

Again the said witness was asked the following question:

Q. Do you know the stockholders of the said company corporation?

A. Yes.

Q. Are they citizens of the United States?

A. Yes.

Defendants' counsel moved to strike out the answer of witness and objected to the question as immaterial, and the court granted the motion and sustained the objection to said question and struck out the answer of witness; to which ruling of the court the plaintiff then and there excepted.

That thereafter, the plaintiff having rested his case and the defendants were introducing their evidence, one GEORGE R. TRASK, a deputy U. S. mineral surveyor, was introdused by defendants as a witness, and when sworn and testifying on the stand, and having testified that he was such deputy mineral surveyor and made the survey for patent for the Emma mine and went upon the ground to survey said claim, and that in the survey for patent he commenced at the southwest corner of the patent survey as shown on the map of such survey by witness, *and* was then asked the question by the counsel for the defendants:

Q. Why did you select that particular place (the S. W. corner of patent survey) as the southwest corner of the official survey for patent?

To which question counsel for the plaintiff objected upon
75 the ground that the same was incompetent and immaterial. Objection overruled by the court, and to which ruling of the court plaintiff then and there excepted, and witness answered the question before the jury as follows:

A. Mr. Flaherty and owners of Stemwinder lode that I have mentioned told me. Did I understand that I can begin by stating the conversations I had with these parties?

COURT: Who pointed it out to you? Why did you go there to do it?

A. Sandy Devine; Mr. Smith.

Q. What Mr. Smith?

A. One of the owners; I don't know his first name—one of the owners of the Stemwinder (stopped by prosecution).

COURT: Just state who pointed it out to you.

A. I am trying to think of the other man's name. Mr. Tyler and John Flaherty took me to the point of rocks—small pile of rocks on the hillside—telling me——

Objection by plaintiff.

A. And pointed out the pile of rocks. Shall I say what this pile of rocks was; what they explained it to me?

Q. Yes.

Counsel for plaintiff objects as seeking to put in advance the proof of the survey and to weave into that a proof of a title. Objection sustained.

A. I am trying to explain this point of rocks pointed out to me as a line.

MIKE CARLIN, a witness on the part of the defendants, was sworn, and testified to having staked out the original Emma mine on the

west end by blazing and marking trees. He was asked, among other things, to explain why the Emma was now surveyed where it is, as follows:

Q. Did you ever have any conversation as to where the true line of the Emma claim was located and where the Stemwinder was?

Objected to by plaintiff as not being competent to prove any title or location to said premises or to any part thereof, and or to act of location, or of vesting title, and being immaterial and hearsay. Objection overruled. Plaintiff excepts.

A. Yes.

Witness CARLIN was then interrogated as follows:

76 Q. Did you have any controversy about it (the true line of the Emma)?
A. Yes; I did.
Q. With whom did you have such controversy or conversation?
A. S. R. Devine, J. P. Smith, locators of the Stemwinder mine.
Q. Was that controversy settled between you in any way or did you do anything towards settling that controversy?
A. We did.

MIKE CARLIN recalled:

Q. State what distance you measured.
A. We measured 300 feet.

Counsel for plaintiff objects as immaterial what he measured from the Stemwinder. It was no way of marking and defining his own claim. Objection overruled. Exception taken.

Q. Did you place any mark or monument to mark the point at which 300 feet came from the discovery of the Stemwinder?

Objection by the plaintiff as immaterial.

A. We did.

Objection overruled. Exception taken.

Q. Describe the monument which you placed at that point.
A. It was a rock monument.
Q. When was this done?
A. Perhaps three weeks after we had made the Emma location.

Counsel for plaintiff objects to answer as immaterial, and moves to strike it out on the ground that they had already made the Emma location. Objection overruled and motion denied; to which plaintiff excepts.

Q. Do you know of any change being made in the position of the discovery post or notice of the Stemwinder after the location of the Emma?
A. Yes.
Q. State what you know about it.

Objected to by plaintiff as being incompetent and immaterial. Objection overruled. Exception.

A. They moved it about 80 feet north. This was after the measurements I have spoken of and a month after the location of the Emma.

77 Defendant then introduced in evidence their recorded notice of location, marked as "Exhibit C, Defendant;" to the reading and introduction of which the plaintiff objected upon the grounds that said notice was not the notice posted on the claim, but written by one Harry Hall, and that the record of the same did not refer to any natural landmarks or fixed objects or contiguous claims as would identify the claim, and that the same did not correspond to the staking or survey of the claim either originally or for a patent, and that the same was void for uncertainty and did not contain such description of the claim located by reference to natural objects or permanent monuments as to identify the claim, and now is void.

Objections overruled by the court and the notice marked as Exhibit C of defendants now then read in evidence; and to which ruling of the court the plaintiff excepted; and to the reading and introduction of which notice in evidence the plaintiff also excepted.

78 *Notice of Location of a Quartz Claim.*

Notice is hereby given to all whom it may concern that John Flaherty, J. L. Smith, M. Carlin, and John M. Burke, citizens of the United States over the age of twenty-one years, having discovered a vein or lode of quartz or rock in place bearing silver and gold, etc., within the limits of the claim hereby located, have this day, under and in accordance with the Revised Statutes of the United States, chapter six, title thirty-two, located fifteen hundred linear feet of this vein or lode, with surface ground six hundred feet in width, situated in Yreka mining district, county of Shoshone, and known as the Emma quartz mining claim, and extending 1,000 feet east and 500 feet west from this notice at the discovery or prospect shaft, which is 500 feet from westerly end line, the exterior boundaries of this claim being distinctly marked by reference to some natural objects or permanent monuments and more particularly described as follows, to wit, on Iron creek, about two and one-half miles in southerly direction from Jackass prairie, and being northerly and adjoining the Stemwinder, and we intend to hold and work said claim, as provided by the local customs and rules of miners and the mining statutes of the United States.

Dated on the ground this 17th day of September, 1885.

Discovered September 17th, 1885.

Located September 17th, 1885.

JOHN FLAHERTY,
J. L. SMITH,
M. CARLIN,
JOHN M. BURKE,
Locators.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

I, John Flaherty, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith called the Emma ledge, lode, or claim, and that the ground and claim therein described, or any part thereof, has not, to the best of
79 my knowledge and belief, been heretofore located according to the laws of the United States and of this Territory, or, if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws.

JOHN FLAHERTY.

Subscribed and sworn to before me this 22nd day of September, 1885.

THOS. E. McLELLAND,
County Recorder.

Endorsed: "Exhibit C." 837. Emma lode. John Flaherty, J. L. Smith, M. Carlin, J. M. Burke.

Filed for record Sept. 22nd, 1885, at 3 o'clock p. m.; at request of John Flaherty, recorded in Book C of Quartz Locations, page 288.

THOS. E. McLELLAND,
County Recorder.

Recorded, at request of Thos. E. McLelland, county recorder, this 5th day of April, 1886, on page 139, Book A of Quartz Locations, Yreka district.

J. C. COLWELL,
Deputy Recorder.

Filed September 27th, A. D. 1888.

F. H. GRIERSON, *Clerk,*
By BARRY N. HILLARD, *Deputy.*

80 Here the witness, GEORGE R. TRASK, is again put upon the stand by defendants, and after testifying about how he came to run the south line of his survey as made for a patent, he was asked the following questions:

Q. Did you survey any line of the Emma Lode claim? And state if any one pointed out the object to which you made your survey on the south side of the Emma Lode claim.

A. Yes.

Q. Who?

A. John Flaherty, S. R. Devine, Mr. Tyler, Mr Smith, who was interested in the Stemwinder mine at the time.

Q. State how you made your survey with reference to the objects they pointed out.

A. I made it strictly in accordance with those objects, running

from the southeast corner of the claim as pointed out as the southeast location corner over a mound of rocks.

Q. Pointed out by whom?

A. Pointed out by John Flaherty, S. R. Devine, Tyler, and Smith.

Again GEORGE TRASK, the said witness, was recalled for the defendant, and he was again interrogated about the so-called compromise line, and the following questions were asked of said witness, to wit:

Q. You may state whether or not the stone monument you have testified to was ever pointed out to you by Michael Carlin (meaning the point marked on the map as compromise line).

A. It was.

Q. State whether or not the stone monument pointed out to you by Mr. Carlin was the one you have indicated on the map.

A. It was.

Objected to beacause Mike Carlin was one of the locators of the Emma. Objection overruled. Exception taken.

Q. And of which you have testified?

A. Yes.

81 The plaintiff, having taken the above exceptions at the trial of said cause, now asks that the foregoing may be settled and certified as *his* true bill of exceptions accordingly, which is now done, and I hereby certify to the same and order the same filed and made a part of the record in this case; and I do further order that, it appearing that this appeal cannot be heard properly without the full minutes taken at the trial, *that* said minutes be incorporated in and made a part of this bill of exceptions and record on appeal, and that such minutes be printed by questions and answers.

JOHN L. LOGAN, *Judge.*

Endorsed: No. 282. District court, Shoshone county, Idaho. The Stemwinder Mining Co., pl'ff, *vs.* The Emma and Last Chance Con. M'ng Co. *et al.*, def'ts. Filed October 16th, A. D. 1888. F. H. Grierson, clerk, by John P. Sheehy, deputy. Pl'ff's bill of exceptions.

And afterwards and on October 19th, A. D. 1888, the plaintiff filed its statement on motion for new trial herein, which is in words and figures as follows, to wit:

82 (Title of Court and Cause.)

TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

The within and following proposed statement on motion for a new trial herein duly served upon us this the 19th day of October, 1888, at the said county and Territory, and a copy thereof accepted and received by us, after depositing and filing the original with the clerk on said day.

Witness our hands at Murray, Shoshone county, Idaho, Oct. 19th, 1888.

WOODS & HEYBURN,
Attorneys for Def'ts.

The within and proposed statement of plaintiff on motion for new trial deposited for the judge of said court and filed with me October 19th, 1888.

F. H. GRIERSON,
Clerk of said Court,
By JOHN P. SHEEHY, *Deputy.*

83 (Title of Court and Cause.)

This action is brought on an adverse claim filed on the part of the Stemwinder Mining Company against the application of John M. Burke, Michael Carlin, Louis Goldsmith, and Michael Flaherty for a patent for the Emma mining claim, in which said application for patent there is in conflict between the Stemwinder mining claim, owned by the plaintiff, and the Emma mining claim, owned by the defendants, a portion of a tract of land described in the complaint herein, known as the area in conflict.

The Last Chance and Emma Consolidated Mining Company has been made a party defendant herein for the reason that after the filing of the application for a patent upon the part of the owners of the Emma Lode mining claim and after the filing of an adverse claim thereto by the Stemwinder Mining Company, as mentioned in the complaint herein, the Emma and Last Chance Consolidated Mining Company, by divers mesne conveyances, claims to be the owner of all and singular the Emma Lode mining claim, by direct conveyances from the aforesaid defendants, and is therein made a party defendant thereto.

The case, being regularly called for trial in the district court aforesaid, came on for trial on the 24th day of September, 1888, before the court sitting with a jury; and, a jury being impannelled and sworn, the case proceeded to trial by the respective parties hereto—Messrs. Hagan and Allen appearing as attorneys for the plaintiff and Messrs. Woods & Heyburn appearing as attorneys for the defendants and all of them.

The trial proceeded upon the issues made by the complaint and answer herein.

Whereupon the following testimony was taken in the case by the respective parties hereto and no other or further testimony was taken, given, or received in said action other than hereinafter set forth.

Plaintiff offers in evidence first the protest and adverse claim filed by the Stemwinder Mining Company against the application of the Emma in the land office at Cœur d'Alene City, Idaho Territory, for a patent, on July 26th, 1887, which was read and
84 received in evidence by the court, in which it is shown that the said plaintiff filed *his* adverse claim, showing the area in

conflict, in accordance with the rules and regulations of the land office.

This was admitted in evidence to show that an adverse claim had been filed by the plaintiff, as alleged in the complaint, and the date of filing.

85 Whereupon FRANK C. LORING, a witness on the part of the plaintiff, was introduced, sworn, and testified as follows:

Q. Mr. Loring, what is your profession?

A. Civil engineer, and my official capacity U. S. deputy mineral surveyor.

Q. How long have you been a deputy mineral surveyor?

A. Seven years.

Q. How long in the Territory of Idaho?

A. Two and a half years.

Q. As such U. S. deputy mineral surveyor, have you made any survey of the exterior boundaries of the Stemwinder and the Emma, as applied for, for a patent?

A. I have.

Q. When?

A. On the 15th day of July, 1887.

Q. Do you remember when the application for the Emma patent was made, so far as the notice was concerned?

A. I do not, directly; I have seen the notice in the papers—have seen the date of it; I have it with me.

Q. Do you remember the first day of the publication of that notice?

A. Twenty-eighth of May, I think.

Q. 1887?

A. Yes; 28th of May, 1887.

Q. You have a copy of it with you, have you?

A. I have.

Q. What is it taken from?

A. From the Wardner News.

Q. Was it there where the notice was published?

A. It is.

Q. Is this the survey you speak of?

Defendants' counsel wishes to know what the witness is looking at.

A. I have a copy out of the Wardner News.

Defendant prefers the witness would not have anything before him without it first being submitted to them for examination. Court thinks witness has a right to look at anything to refresh his memory.

86 Q. Within sixty days of that time did you make this survey?

A. I made the survey within sixty days of the 28th day of May.

Q. On the 15th day of July, you state?

A. On the 15th.

Q. Does that map behind you represent anything of that survey?

Defense prefers to have the map proven.

A. That is a map made by me, representing the survey I made on that day.

Q. You made the survey in the field on the ground?

A. I did.

Q. For what purpose or purposes did you make that survey?

A. I made that survey for the purpose of an adverse survey against the Emma lode.

Q. For any other purpose?

A. Not before that.

Q. Did you make a subsequent survey?

A. I made one on the 18th, also.

Q. What for?

A. I made a patent survey on the 18th.

Q. Of the Stemwinder?

A. Of the Stemwinder.

Q. Turn yourself around here and let me ask you some questions from the map. From what, if that is the map, was that made, and from what data was it made?

A. The map was made from the notes of a survey, made by me on the 15th of July, of the exterior boundaries of the Stemwinder lode, and the connection therefrom with the Emma lode, and of the exterior boundaries of the Emma lode.

Q. When you refer to the exterior boundaries of the Emma lode, do you mean or not the survey of the Emma for a patent?

A. I mean the exterior boundaries of the patent survey of the Emma lode.

Q. Now, state what you did in connection with the survey of the Stemwinder claim as it appears there. Have you your notes with you?

A. You mean the method I adopted?

Q. Yes; where you ran and how many feet you ran.

87 A. I ran from the centre southerly end——

Q. Point it out to the jury.

A. From here, at this point, to the southwest and southeast corners; thence I ran north 11 degrees and 58 minutes west 600 feet to the centre northerly end; thence I ran to the northwest and northeast corners. Then I connected the northwest corner of the Stemwinder lode with the northwest corner of the Emma lode, as surveyed for patent, and measured the exterior boundaries of the Emma lode.

Q. How did you ascertain the area in conflict between these two surveys?

A. By calculating from those data.

Q. Did you run those lines, or have you just stated?

A. I run those lines as stated.

Q. Did you run the exterior lines of the Emma through so far as to enable you to procure data for the conflict?

A. On that day?

Q. Yes; on that day.

A. Yes.

Q. Will you state the field-notes of the Emma—the conflict of the Emma and the Stemwinder?

A. State the description of the area in conflict?

Q. Yes. First state, if you have it there, the description of the Stemwinder as surveyed on your map.

A. I will begin at the southwest corner; thence north 11 degrees and 58 minutes west 600 feet to the northwest corner; thence south 17 degrees and 50 minutes east 700 feet to the northeast corner; thence south 11 degrees 58 minutes east 600 feet to the southeast corner; thence north 17 degrees and 50 minutes west 700 feet to the southwest corner.

Q. Now, state to that description you have given the description of the area that is in conflict with the survey of the Emma for a patent.

A. I will begin at the southwest corner (number 2) of the Emma lode; north 1 degree east 114 feet to the northwest corner of the Emma lode; thence north 82 degrees and 23 minutes east
88 82.4 feet to the point of intersection of the north end line of the Stemwinder lode and the north side line of the Emma lode, south 71 degrees 50 minutes east 534.9 feet to the northeast corner of the Stemwinder lode; thence south 11 degrees 58 minutes east 59.6 feet to the point of intersection of the east side line of the Stemwinder lode and the south side line of the Emma lode; thence north 80 degrees 40 minutes west 612.8 feet to the point of beginning.

Q. How is that area in conflict represented upon the map by color?

A. By yellow on the map.

Q. What is the area in conflict?

A. 1.38 acres.

Q. How did you ascertain the conflict, so far as the Emma survey was concerned—in other words, did you run the exterior lines of the Emma to ascertain?

A. I did.

Q. By a survey in the field?

A. I did.

Q. And that map, then, what have you to state, correctly or otherwise represents the Emma as surveyed for a patent and the Stemwinder as surveyed by you and the area in conflict?

A. It correctly represents the surveys of those lodes I made upon that date, and the area in conflict.

Q. What did you find when you made that survey to direct you as to the exterior boundaries of the Stemwinder?

A. I found the corners of the Stemwinder.

Q. Commence and describe them around that you found.

A. The southwest corner of the Stemwinder was at that time a post 4 x 4 inches and 5 feet long, the northwest corner of the Stemwinder was a post of the same dimensions, the northeast corner of the Stemwinder was a post 5 x 5 inches and 5 feet long, and the

southeast corner of the Stemwinder was a post 4 x 4 inches and 5 feet long.

Q. Did you have any centre end stakes?

A. I had centre end stakes. The centre end stake on the south end was a post 6 feet long and 6 inches square; at the north end was a post 4 x 4 inches and 5 feet long.

89 Q. How were those stakes marked?

A. They were marked, respectively, the southwest corner of the Stemwinder, the northwest corner of the Stemwinder lode, the northeast corner of the Stemwinder lode, the southeast corner of the Stemwinder lode, the south end centre of the Stemwinder lode, and the north end centre of the Stemwinder lode.

Q. Marked on the stakes?

A. They were.

Q. Did you find any stake at the point of discovery?

A. I did not.

Q. Did not go there?

A. The point of discovery or the amended location was at the south end.

Q. And that was the stake you have already described?

A. It was.

Q. It would be the same centre end stake on the south?

A. Yes.

Q. Was there a notice of discovery on it?

A. There was.

Q. Did you read it?

A. I did.

Q. How did the boundaries of the claim you surveyed correspond with the calls of the notice you read there?

A. They did not correspond.

Q. In what respect did they not correspond?

A. They embraced more ground than is shown in this map of my survey on that date.

Q. How much? And explain how.

A. I cannot tell in acres.

Q. I don't care about that.

A. The southeast corner was at that time 19½ feet more to the southeast, and the northwest corner was 19½ feet more to the northwest.

Q. Then what was the variation between that survey and the call of the notice?

A. This survey differs from the call of the notice in that it embraces less ground.

90 Q. How many feet, about, at each one of those corners you speak of?

A. 19½ feet at those respective corners; nothing at the other corners.

Q. You mean diagonally opposite corners?

A. Yes.

Q. About 19 feet?

A. I will correct that: It makes a difference of 19½ feet in width,

perpendicular to the north side line; but diagonally on the course of the side line of the Stemwinder, it makes a difference of a little more than that.

Q. I am talking about the actual number of feet.

A. Actual number of feet in length would be—I can tell by slight calculation.

Q. You can approximate it.

A. About 25 feet.

Q. Were the stakes there on the ground that you could see?

A. They were.

Q. You read these notices, I think.

A. I did. I will state that when I saw and read them I recognized the notice as the notice which I had examined and partly caused to be made myself on a previous date.

Q. I am coming to that now. When did you first see this notice on the claim that you speak of as seeing on the centre end stake?

A. I first saw the notice on the claim at that date, the 15th of July.

Q. Did you make the survey prior to that?

A. I did.

Q. What for?

A. For the purpose of making an amended location of the Stemwinder lode.

Q. Did you plant the stakes?

A. I did.

Q. Where did you plant them?

A. Shall I state with reference to these stakes?

Q. Yes; with reference to that map.

A. I planted the southwest and northeast corners where they are shown upon this map; the southeast and northwest cor-
91 ners at a distance of twenty-five feet from where they are shown on the map.

Q. Did you say this area that you surveyed there is within these boundaries you planted?

A. It is.

Q. You have not exceeded them?

A. I have not.

Q. What are those dots and cuts there on the Stemwinder you have on the map?

A. It is to represent improvements on the Stemwinder.

Q. Take each one in detail and see what you find there in the survey.

A. The point marked 1 is a tunnel about 50 feet long, which has at the end a shaft 30 feet deep. That marked 2 is an open cut 10 feet wide 20 feet long. That marked 3 is a tunnel 60 feet long. That marked 4 is a tunnel 25 feet long. That marked 5 is an open cut about 6 feet square and 15 feet deep at the upper side. That marked 6 is a shallow open cut about 6 feet square, and that marked 7 is an open cut 35 feet long and about 8 feet wide.

Q. Did you yourself measure these improvements?

A. I did.

Q. And what you state now is the result of that measurement?
A. Yes.
Q. You have calculated—I don't see it marked on here—the area of the entire Stemwinder as you surveyed it there?
A. I have. I don't think I have it with me. I can tell you in round numbers in a minute; 8.2 acres.
Q. That is approximately, is it?
A. Approximately.
Q. You speak of the amended location. Did you make any efforts to ascertain the stakes or the ground embraced in the original location?
A. I did.
Q. What did you do in that behalf?
A. I established the north side line of the Stemwinder lode in order that my north boundary line would not go inside of the north side line as I established it.
Q. Point out to the jury what you mean.
A. I established—suppose this is the original northwest corner of the Stemwinder and down here is the original northeast corner of the Stemwinder, I ran this north side boundary line in order that my north boundary line of my amended location survey would not go outside of this original north side line.
92
Q. How was it with the other side?
A. With the other side I took the northeast boundary of the Bunker Hill line as my boundary line.
Q. Did that correspond with the stakes of the original location as you discovered them, the south side line at that time?

Objected to by the defence. There has been no proof of an original location, and because it assumes that he knows something about an original location. Objection overruled.

A. Upon the date I made the survey for the amended location I did not establish the south side line of the Stemwinder lode, but established the south line of my survey exactly upon the north boundary line of the Bunker Hill lode. When I made the survey for the adverse against the Emma, I left out the ground as shown on this map between the Bunker Hill and the Stemwinder because I was told there was a small fraction existing between them that is not located—that they did not wish to include.
Q. The original location, you mean?
A. Yes.
Q. Is or is not that survey of the Stemwinder there within the lines of the original as you found them at that time?
A. It is.
Q. It is within the lines?
A. Yes; it is.
Q. Do you know whose handwriting that amended notice was in?
A. No; the amended notice was in the handwriting of two individuals.
Q. Who were they?

A. The description of the boundaries was in the handwriting of W. B. Milley, who was my assistant at that time.

Q. Surveyor?

A. Surveyor's assistant.

Q. Whose was the other in?

A. I recognized it as the handwriting of Judge Hagan. I did not see him write it.

93 Q. See how that compares with what you saw as the amended location. (Paper shown witness.)

Defense asks that the paper be shown them before it is given to the witness for examination, and objects until the object of it is known. Objection overruled.

Q. You say you saw an amended location on the centre post there?

A. Notice of amended location—yes.

Q. I asked you how that compared with it, or was it like that one?

A. I have examined this and it is identical with it.

Q. Is it not a fact that you compared the two with me (Judge Hagan)?

A. It is.

Q. And that is one of them?

A. It is.

Q. And the other, you say, was on the post?

A. It was.

Q. That the exact copy of the other?

A. Yes.

Q. Now, in order to make it more specific, if you have not already, how does your survey there for an adverse compare with the description as given in this notice I have handed you, and that you saw on the post?

Objection by counsel for defence on the ground that it is a deduction that the jury will draw as to how they compare.

COURT: Ask witness where he got the data from which he made this survey.

Q. Do you say you saw that on the post and know the description in it?

A. I do.

Q. Is there any variance between that description in the notice that you saw and the one you have delineated on your map?

Counsel for defense objects to the question as proving the contents of the notice on the claim. Court decides that any notice may be proved that is material.

Q. (Paper shown witness.) How does that compare with the map you speak of?

94 Objection by the counsel for the defense because the question is about the notice on the post. It may be proven by this copy if it is proven not to be in existence or in the hands of

the opposite parties. Court does not think this is the proper way to prove the paper unless it is proven that the other was lost.

Q. You say you made your survey for the adverse — from a description contained in the amended notice you saw staked upon the claim?

A. Yes.

Q. Please give us that description.

Counsel for the defense says that they are entitled to know and compare that in existence and have the prosecution produce the paper or account if they are in existence. Court rules, for the purposes of the survey, witness has a right to state how his survey conforms with the description in the notice, but not for the purpose of proving the contents of the original document.

Q. Give us the description of your survey there that you made for your adverse claim.

Objected to by defense as cumulative.

COURT: Witness can tell whether he has stated or not.

A. I did.

Q. You say you erected the stakes for the amended location?

A. I did.

Q. And you saw the amended location posted upon the stake as you said?

A. I did.

Q. The south centre end stake, you said?

A. Yes.

Q. What was the course of the post from the southeast corner to the northeast corner?

Counsel for defense objects to the course being given, as indicated by the notice, but no objection to the actual course between the two posts being given.

Q. Commence and give the courses and distances of your survey for the amended location as you marked it on the ground.

A. Beginning at the centre of the southeast end——

95 Counsel for defense wants to know what the witness is reading from.

A. It is a copy of my original notes.

Defense asked the witness to read from the original notes.

A. I have not the original calculations with me.

Q. From what is the memorandum taken?

A. From the description from my office book that I keep on file of my surveys.

Q. Did you produce that from your original notes?

A. I did.

Q. Is it correct?

A. It is.

Q. How do you know?

A. Because I copied it from my original notes; made the calculations myself.

Q. And you made the original notes yourself, did you?

A. I did.

The former objection of counsel for defense withdrawn at this time.

A. The description is as follows: This description is deduced from my original survey of the amended location of the Stemwinder. Beginning at the centre southeast end, thence north 69 degrees 40 minutes west 365.85 feet to the southwest corner.

Q. 356, is it not?

A. 356; yes, sir; that is right.

Counsel for the defense objects to the accuracy of the description.

A. It is half of 713 and something—713.7; thence north 12 degrees and 28 minutes west 619.6 feet; thence south 69 degrees 40 minutes east 713.7 feet; thence south 12 degrees 28 minutes east 619.6 feet; thence north 69 degrees 40 minutes west 356.85 feet to the place of beginning.

96 Cross-examination:

Q. What is there to indicate that point marked 4?

A. At the present time?

Q. Yes.

A. There is a stone monument and a post—that is, there was the last time I saw it.

Q. When was the post placed there?

A. On the 17th day of May, 1887.

Q. Who by?

A. By myself.

Q. For what purpose did you place it there?

A. For the purpose of marking the boundaries of the survey.

Q. What survey?

A. Survey of the amended location of the Stemwinder lode.

Q. Why did you place it — that particular point?

A. Because that was the point that my survey told me to place it.

Q. You had made your survey before you planted the post?

A. Certainly.

Q. Why did you measure to that particular point?

A. Because that — 300 feet perpendicular from my starting point.

Q. Where was your starting point?

A. Centre, southeast end.

Q. Which do you term the southeast end?

A. The centre end, on the southerly side.

Q. Why did you begin at that point to survey?

A. Because that was as near as I could tell the centre point of the Stemwinder.

Q. Was there anything there before you planted a post there?

A. There was not.

Q. Was there anything in the immediate vicinity of it to mark a point?

A. No; nothing.

Q. Then you initiated that point at that time originally?

A. I did.

Q. Who pointed it out to you?

A. I ascertained it myself with the assistance of others.

Q. Did any person direct you to make that a starting point?

A. It was agreed that I should.

97 Q. By whom?

A. A man told me I could and I agreed that it should be.

Q. Just an arbitrary starting point?

A. Yes.

Q. Then you ran three hundred feet to the point marked 4?

A. 356.85 feet.

Q. Why did you run that particular distance?

A. Because by calculating a perpendicular distance from it I calculated by the trend of the apex that point would be 300 feet from the apex at right angles.

Q. 300 feet at right angles from the centre of the vein?

A. Yes.

Q. Then you established that point as an original act?

A. I did.

Q. There was nothing there to indicate a corner of the mining claim?

A. No.

Q. Nothing in the vicinity of it?

A. Yes.

Q. How close?

A. About 250 feet, if I remember right, in a northwesterly direction was the original southwest corner of the Stemwinder lode.

Q. Then you established it here? Why did you not establish it at that point 250 feet away?

A. Because that would be over 300 feet from the apex of the vein.

Q. What is there to indicate the point marked 3?

A. The last time I saw it there was a stone corner and a post.

Q. Who put the post there?

A. I caused the post to be put there.

Q. Why did you cause the post to be planted at that point?

A. In order to establish the boundaries of my survey.

Q. What was your reason for placing it at that particular point?

A. Because that point would be an equal distance from the apex as the other point which is marked 4 would be.

Q. Why did you place it at that point with reference to the line of the Bunker Hill claim?

A. I wish to amend my answer there in regard to being a

98 stone there at that time. There was no stone there. The original corner was about 25 feet from the point marked 3 on this map, exactly on the north side line of the Bunker Hill.

Q. Well, give that point, then, on the north side line of the Bunker

Hill; why did you establish that as a corner of this mining claim you were surveying?

A. Because that point would be 300 feet perpendicular from the apex.

Q. When you established corner No. 3 why did you change it from the position you had originally selected?

A. Because I was directed to leave out that triangular piece of ground in the map.

Q. By whom?

A. Mr. George B. McAulay.

Q. Was that any portion of a mining claim, that Bunker Hill piece of ground?

A. I was told it was.

Q. What did you find at point 2?

A. When I made my survey, nothing.

Q. What did you place there?

A. A post 4 inches square and 5 feet long.

Q. Was there any other post in the immediate vicinity of it that belonged to this mining claim?

A. No; there was not.

Q. Why did you select that particular place to locate the post?

A. Because that would give a perpendicular distance of 300 feet from the apex.

Q. What did you find at point 1 at the time you made this survey?

A. No corner.

Q. What did you put there?

A. A post.

Q. For what purpose?

A. For establishing one of the boundaries of my survey.

Q. Why did you select that particular place?

A. Because that would also be a perpendicular distance of 300 feet from the apex.

99 Q. Did you find a notice of location upon that ground at the time you went there to make that survey you have just been describing?

A. I did not.

Q. What was there to direct you in the location of the claim in that particular shape?

A. The apex of the vein and the original corners as shown to me.

Q. Where is the apex of the vein on that plat?

A. The apex of the vein as surveyed by me would pass midway between corners 4 & 3 and 1 & 2.

Q. What does the point indicate within the yellow ground?

A. The alleged area in conflict.

Q. The point to which my pencil is directed surrounded by a black line?

A. The alleged discovery of the Emma.

Q. Why do you say alleged?

A. Because that was pointed out to me as the discovery. I did not see the men make the discovery.

Q. What did you see there from which you made the marks on this map?

A. I saw an open cut started and a tunnel started covered with timber and brush, and driven a short distance beyond that into solid formation; that is not so; I was thinking of another tunnel. I found a small open cut, as near as I can recollect. I cannot give the dimensions of it. There has been some work done; I cannot tell how much.

Q. Did you examine it as to whether or not there was mineral there?

A. I have not.

Q. You saw the discovery or the abbreviation of the discovery of the Emma?

A. Yes.

Q. If you did not examine it and did not know it was a discovery, why did you mark it there as the discovery of the Emma?

A. Because I was directed to locate that point.

Q. Were you directed to mark it that way on the map?

A. No; I was not.

Q. You have detailed an amount of work that was done as indicated upon the cuts upon the other portion of the area. Was that work done at the time you made this survey?

A. Not the amended location survey. No, sir; not all of it.

Q. What portion of it was done?

A. Nearly all of it. The open cut marked 7 was not started at that time. It was just started that day.

Q. Did you survey at the time you made the survey for the adverse — from the southeast to the southwest corner of the Emma?

Q. Yes; I did.

Q. Where did you set your instrument to survey that line?

A. At corner 1 of the Stemwinder lode.

Q. Then how did you survey along the south line of the Emma?

A. By running a line from corner 1 of the Stemwinder lode to corner 2 of the Emma, and from corner 1 of the Stemwinder to corner 3 of the Emma.

Q. From the southeast to the southwest corners?

A. I did that; not directly, though.

Q. How did you do it?

A. By running from corner 2 of the Stemwinder lode by irregular lines to corner 1 of the Emma by random line.

Q. Then you did not survey directly to corners No. 1 & 2 of the Emma at any time?

A. I did not run a straight line to the corners.

Q. You did not measure the line directly between them?

A. Not a direct line; no, sir.

Q. Did you ever measure a line between 1 & 4 of the Emma?

A. Not a right line.

Q. Between 4 & 3?

A. Not a right line.

Q. How did you determine the distance between 1 & 4 of the Emma?

A. By deducing my notes giving the calculations of the different corners by means of platting and calculating to ascertain their true course and distance.

Q. What is the point to which my pencil is directed upon your map?

A. That is a pencil-mark.

Q. Q. I asked you what it was.

A. It was something I was directed to place there by X. S. Burke.

101 Q. What is the point to which my pencil is directed?

A. It is another point which X. S. Burke directed me to place there.

Q. Read what is described at each of these points.

A. Northwest corner of the Emma; that is written.

Q. What is inscribed at this point?

A. S. W. corner Emma.

Q. Q. What is indicated by the point——

Counsel for the plaintiff objects to further examination on this line as not part of the survey.

Q. What is indicated at the point to which my pencil is directed to now?

A. Marked W. E. C. Emma.

Counsel for the plaintiff objects again as being no part of the witness'*es* survey.

A. No, sir.

102 Redirect examination:

Q. He spoke of running a direct line there. Did you ascertain the course and distance of that line by the manner in which you surveyed it?

A. I did.

Q. Is it necessary to run a direct line to ascertain it?

A. It is not. I seldom do that.

Q. Who pointed you out the point marked the discovery of the Emma? State whether or not that was within the line of the survey of the Stemwinder you made.

A. It is.

Q. How far from the north end line of the Stemwinder?

A. Directly, it is about 60 feet.

Q. You were asked, furthermore, about your starting point. Do you have to have a starting point in every survey you make?

A. I do.

Q. The starting point you say, then, was that south line?

A. It was the south or southeast centre end.

Q. What direction is north on that map?

A. Direction of the Emma.

Here counsel for plaintiff offers in evidence the map made by the

witness F. C. Loring and marked Plaintiff's Exhibit B; which map is as follows:

(Here follows diagram marked p. 103*a*.)

103 Objection by counsel for the defense to the introduction of the map in evidence, except it be simply for the purpose of explaining the testimony of the witness. Objection overruled.

Here the plaintiff also offered and read in evidence the articles of incorporation, showing the incorporation of the Stemwinder Mining Company, organized under and by virtue of the laws of Oregon, certified to by the secretary of the State of Oregon; which articles of incorporation are marked "Plaintiff's Exhibit C."

Objection by counsel for the defense to the introduction of the articles of incorporation in evidence, because the laws of Oregon prescribes that the county clerk should be the custodian, and that the laws of Oregon require that the articles of incorporation should be filed with the secretary of the state, as also with the county clerk. Objection overruled.

These articles showed that the Stemwinder Mining Company was incorporated in the State of Oregon on the 10th day of March, 1887, by Van B. De Lashmutt, David Goodsell, H. W. Monastes, and C. W. Knowles, a copy thereof filed with the secretary of the State of Oregon on March 11th, 1887.

104 X. S. BURKE, a witness on behalf of the plaintiff, was then called, sworn, and examined, and testified as follows:

Q. What is and has been for two years last past your business?

A. Civil engineer.

Q. In what official capacity?

A. I have been U. S. deputy mineral surveyor in this territory about three years.

Q. Have you ever surveyed the ground so as to ascertain where the exterior boundaries of what is known as the original location of the Stemwinder were?

A. I have.

Q. Can you tell from that map up there about where they were to the jury?

A. I can tell about where they were from that map.

Q. Proceed and tell us where the northeast corner was; commence at any corner as an initial point—commence at any corner you please of the Stemwinder.

A. The original northeast corner of the Stemwinder was at that point as indicated upon this map here.

Q. When you say that point make any mark you please so the reporter can indicate it.

A. Point marked N. E. corner S. is the original northeast corner of the Stemwinder. I can only mark in a general manner where the southeast corner of the Stemwinder would be. It is about in

that locality. It is not designated by any particular mark on this map.

Q. Can you mark it there?

A. I can mark it very near. What is a point now marked S. E. corner S. is in the immediate vicinity of the southeast corner of the Stemwinder.

Q. Where is the original centre end stake there?

A. The point now marked E. C. end Stemwinder.

Q. Put a letter mark there, will you?

A. I have done so.

Q. What is it lettered?

A. E. C. end S. I mark S. W. corner S as the southwest corner of the Stemwinder as originally located. The point now
105 marked N. W. corner S. is the original northwest corner of the Stemwinder.

Q. Now mark them with letters A, B, C, and D.

(Witness letters the points indicated.)

Q. Now state to the reporter how you have them marked.

A. A is the northeast corner of the Stemwinder; B is the east centre end of the Stemwinder; C is the southeast corner of the Stemwinder as nearly as I can designate it; D is the southwest corner of the Stemwinder; E is the west centre end of the Stemwinder, and F is the northwest corner as originally located.

Q. When you say corners what do you mean?

A. The posts, trees, and monuments placed upon the ground to designate the original boundary of the location.

Q. Under what circumstances did you ascertain these boundaries?

A. By an actual survey of the ground.

Q. When did you make that survey?

A. I commenced it on the 6th day of June, 1886; probably was busy four days.

Q. I mean the Stemwinder.

A. That was commenced upon the 6th and finished on the 7th, I think.

Q. At what initial point did you commence that survey?

A. I commenced—in the first place, I connected it with other surveys; I commenced with the Bunker Hill, ran from it to this southeast corner of the Stemwinder. That was the commencement of my survey.

Q. In what year was this?

A. 1886.

Q. June?

A. 6th day of June.

Q. Go ahead now.

A. I commenced with that point, having connected it with the corner of the Bunker Hill; ran from that corner——

Q. First, before you leave it, what kind of stake was that and how did you find it marked?

A. It was a small tree, as I recollect it, cut off and squared up,

but it would make a stake about 4 or 5 inches square, standing below a large cliff of white rocks near Milo creek, and it was designated as the southeast corner of the Stemwinder, properly marked. I took down no marking, but I remember it was properly designated—that and all other stakes around the claim that I found. I ran from that point to the centre end stake of the Stemwinder, where I found a small tree, cut off and squared, I should judge, about 5 or 6 inches through; it was either a tree or stake, but it seems to me it was a tree cut off. As I took down no description of the stake, I can only depend on my memory as to what it looked like.

106

Q. Was it blazed?

A. Squared and properly marked as the east end centre of the Stemwinder. I think that was the way it was marked. I ran from there to the stake to the rear of Ed. Zieger's cabin, properly marked the northeast corner of the Stemwinder. I ran thence in a line expecting to strike this corner from the description, but I ran to a point 13 feet to one side of the centre end stake of the Stemwinder. I then ran from that point to the northwest corner of the Stemwinder, came back to that point, and connected the southwest corner with my survey.

Q. What did you find at that end?

A. At the northwest corner of the Stemwinder was a stump about 12 inches square squared up and marked the northwest corner of the Stemwinder. I found here at the west centre end stake a tree probably 12 inches in diameter, slightly rotten, dead tree, marked the west centre end of the Stemwinder. I found at the southwest corner a stake about 50 feet away from the northwest corner of the Bunker Hill; it was a stake about 4 inches in diameter, squared, probably 4 feet high, and marked properly the southwest corner of the Stemwinder.

Q. With reference to the map, did you state or not where would the north side line of the original location as you found the stakes run on the line there?

A. It would run considerable outside of this line. The original line would lay farther to the north by about 20 feet.

Q. Embrace more ground than that diamond-shaped survey would embrace?

107

A. Yes.

Q. By at least 20 feet?

A. All that, I should think.

Q. That is approximately?

A. Yes.

Q. I wish you would look at that map and see whether the present boundaries of the Stemwinder, as delineated by Mr. Loring, are outside of any ground you have surveyed as the original.

A. No; I have taken pains to verify that fact by measurement in my office, and I know that all portions are within the original location as I found it upon the ground two years ago.

Q. Are you acquainted with that ground pretty well from that day on to the present time?

A. I have been over a number of times surveying since then.

Q. As surveyed by you and the original stakes did the original location lay along or across the vein?

A. Across it.

Q. About where is that point now, from developments running across that ground, if you know?

A. I know generally that it runs through those developments, about the centre.

Q. That is the trend or strike of the vein?

A. It is the trend of the apex of the vein.

Q. Apex, I mean?

A. Yes.

Q. Were any persons with you when you made this survey?

A. Mr. Tyler was with me and showed me those stakes.

Q. Who is Mr. Tyler?

A. A partner of S. R. Devine, one of the owners of the Stemwinder.

Q. Was Mr. Devine there?

A. He was not present at the time I made my survey; he was in the town of Wardner.

Q. Did Mr. Tyler point out those stakes to you?

A. I was making the survey under his directions; that survey.

Q. You found them all marked as you indicate?

A. Every one of them.

Q. And your survey was correctly made?

108 A. It was.

Q. As you have shown the positions?

A. Yes; as I have shown them approximately here in this corner.

Q. I understand you approximated it in that corner. What was the appearance of the marks on the stakes and the stakes themselves, as to being recent or old?

A. They were not very old at the time I saw them—some of them. The only one that was at all dim at that time was the west centre end stake, which was marked upon a rotten tree and the marking was rather dim there. I could simply trace the indentation in the wood.

Q. The tree was decayed?

A. Yes.

Q. What were the indentations, as to being made very recently or the fall before?

Counsel for defendant objects to the question or anything but the facts.

Q. What were the appearances?

A. They were none of them obliterated; very plain except the one on the west centre end, which was not very plain.

Q. What was the appearance as to the time when they were likely to have been put there?

Counsel for the defense objects as forming a conclusion.

A. I cannot tell about that.

COURT: You can describe them as to any part of them being obliterated?

A. I can scarcely describe the stakes without giving something of an opinion. The blazes were, as a rule, but slightly discolored; they looked reasonably fresh, but not as though they had been made within a day or two; they did not have that appearance—that aged or colored appearance—that they would have had had they been made for two or three years.

Q. How did they compare with other locations you have seen around there in appearance?

Counsel for the defense objects to the question as incompetent and immaterial.

COURT: Just lay the foundation for giving testimony as to whether the thing looks old or new.

Q. In your capacity as engineer have you had occasion to observe the marks and blazes upon trees frequently?

109 A. Yes; I have.

Q. Do you feel yourself competent to judge within a reasonable time about when they were made; whether they were made recently or a month or a year?

Counsel for the defense objects as incompetent. Objection overruled.

Q. From the appearance of the blazing and the inscription, what would be your judgment as to the time they were placed there?

Counsel for defense objects to the question as incompetent. Objection sustained.

Q. In your experience as a mining engineer, what has been your experience as a mining engineer in your observation of these stakes or any stakes you have come across?

A. Of course, I have had considerable experience in examining stakes upon mines.

Q. State what experience you have had.

A. Not only as an engineer, but as a prospector and miner, some of which I have done, and have had occasion to examine a great many stakes.

Q. Running through how many years' experience?

A. 12 years.

Q. About how many stakes and blazes, etc., do you think you have examined during this period?

A. Quite a number; I cannot say how many.

Q. From your experience are you competent to judge approximately of the appearance of the marks, etc., upon stakes?

Counsel for defense objects as immaterial.

COURT: Ask witness the direct question, Can he tell?

Q. Can you tell from the appearance of the stake, blazes, and inscriptions thereon within a reasonable time when it was done.

Counsel for defense objects as immaterial. Objection overruled and exception taken.

A. I think I can tell within a reasonable time when a tree was blazed, especially if it is a living tree.

Q. Then what is your best judgment as to when these stakes were blazed and marked, from the appearances that you notices when you examined them?

Counsel for defense objects to the question as incompetent
110 and immaterial. Objection overruled and exception taken.

A. I should judge from the appearances of these stakes that they had been blazed and exposed to at least one winter's snows, probably two, but probably not, as they had too fresh a look to have been there for two or three years, and had been there at least one winter, or else through a very wet season—one or the other.

Q. Did you see at any point there, as indicated by you, where the apex was, any evidences of mineral?

A. I did.

Q. Can you point out about the locality to the jury and what it was?

A. At that time I saw evidences of mineral. It is a little difficult to locate places on this map, because I am not familiar with it.

Q. Approximately, the best you can.

A. It was in the vicinity of this open cut 6, as near as I can judge, not being so very familiar with this map.

Q. What did you see there?

A. I saw a big cliff of rocks containing a large number of small streaks of mineral.

Q. What kind of mineral?

A. Galena.

Q. Was it in plain view?

A. It was exposed by nature.

Q. At any rate, it was within the limits there of that survey?

A. It was about 50 feet west of what is their discovery shaft, but just where that is on this map I cannot say.

Q. How was that mineral lying?

A. In place.

Q. At the point you speak of as their discovery, did you see any mineral there?

A. I saw iron rock showing what I judged to be chloride of lead.

111 Cross-examination:

Q. Did you make any lines on this map except those you have made here to-day?

A. None except some of those lead-pencil marks there.

Q. Did you make these lead-pencil marks?

A. I don't remember whether I made them or Mr. Loring, from

the notes I read off to him; one or the other made them some time ago.

Q. What was there to mark what you have marked as the southwest corner of the Stemwinder at the time you made this survey you have been describing?

A. A stake about 4 or 5 feet high and about 4 inches square.

Q. Was it a green or a dead tree?

A Neither.

Q. What was the character of it?

A. It was a stake.

Q. Driven in the ground?

A. Driven in the ground.

Q. What kind of wood was it?

A. Either pine or tamarack.

Q. Had it bark on it?

A. Not at the top; it had at the lower portion.

Q. Was it a green stake when it was put there?

A. It looked like a dead stake?

Q. Had it been squared on all four sides?

A. Near the top.

Q. What writing was on it?

A. Either southwest or S. W. corner of the Stemwinder.

Q. Anything else?

A. I recollect nothing else; it was two years ago; I cannot recollect.

Q. On which side of the post was it written?

A. On the side facing toward the Bunker Hill stake, which would be the north side.

Q. On the north side; the side toward the Bunker Hill stake?

A. Yes.

Q. Where was the Bunker Hill stake?

A. That point, a little below.

112 Q. That would be the east side, would it not, if it was below?

A. Yes, sir. I should have said east side.

Q. What was it written with?

A. Lead pencil.

Q. Ordinary black lead pencil?

A. Yes; as near as I can recollect, that was the marking.

Q. Did you say it was neither old or new in appearance?

A. The marking was plain, not obliterated as much as two or three years usually obliterates lead pencil.

Q. Was it obliterated at all?

A. No, sir; not all.

Q. Perfectly plain?

A. Perfectly plain to read.

Q. Was the centre stake new in appearance?

A. No; not entirely so.

Q. You say it might have been two years old—probably one?

A. Probably one year; I don't recollect any more than its being a dead stake. It could not change it mush from the year before.

Q. What was there to mark the southeast corner as you recollect it?

A. A stripling about 5 inches through, which had been cut off at about a distance of four feet above the ground and squared.

Q. Was it green or dead?

A. Well, I declare I don't know. I think that was dead.

Q. You think it was dead?

A. I think it was.

Q. Have you any distinct recollection on the subject?

A. Only as to its size and marking.

Q. Or opinion as to whether it was a dead or green stump?

A. I think it was dead, as I recollect.

Q. Was it pine?

A. Tamarack, I should think.

Q. How was the writing on that?

A. Just about the same as on the other. It was written upon a surface that was pretty hard—smooth; the writing very plain.

Q. The writing very plain?

A. Yes.

Q. That was lead pencil?

113 A. Yes.

Q. Describe the writing. Was it a bold, easy hand or otherwise?

A. It was a readable hand; not a very handsome hand.

Q. Any name signed on it?

A. I don't recollect any name being on either one of them.

Q. Nor a date?

A. Nor a date.

Q. No marks or evidences of marks except those you have spoken of?

A. Not upon either of those two stakes.

Q. At the east centre end you have described what did you find there?

A. A stake or tree squared; I don't know which it was; it was small and it was black.

Q. Black?

A. Yes.

Q. A burned stump?

A. I don't know whether it was a burned stump or a burned stake; remember simply it being black.

Q. Was it slit?

A. It was.

Q. Was it marked?

A. It was.

Q. Were those marks plain?

A. Not as plain as some of the others, as there had evidently been a fire which had a little effect upon it after it had been marked.

Q. Then there were hewed faces upon it?

A. There were.

Q. Did they bear indications of having been burned since hewed?

A. They did.

Q. Still you could read the writing on it?
A. Yes.
Q. Plainly?
A. Plainly; indentation in the wood.
Q. Could you read it by its color?
A. No; I don't think I could.
Q. Just by the indentation in the wood?
A. Yes.
114 Q. Any dates on that?
A. I have no recollection of a date anywhere on the claim.
Q. No recollection of any date?
A. No.
Q. Well, pass to the northeast corner you have indicated. What did you find there?
A. I found a stake right behind Ed. Zieger's cabin.
Q. Describe it; was it a green or a dead stake?
A. Dead stake; blackened also.
Q. That had been burned since it was planted there, had it?
A. I don't know; it was black.
Q. Was the writing on that plain?
A. It was perfectly plain.
Q. Plain from its color or the indentation?
A. Both; principally from its color, I think, on that one.
Q. Was there any brush about this place where the stake stood, at the northeast corner?
A. Not at the time I went there.
Q. Was there evidences of brush having been burned away?
A. Yes.
Q. Small brush or dead timber?
A. I cannot say.
Q. It was entirely burned up?
A. Yes.
Q. This, you say, had been a dead stake?
A. I think it had; there was no indication of any green bark or anything of that sort.
Q. Well, pass now to the northwest corner, what did you find there? You have stated a large tree, about a foot square. Was it a green or dead tree?
A. That was a green tree originally; there was nothing but the stump left.
Q. How high had it been cut off from the ground?
A. 2½ or 3 feet; rather low down.
Q. And squared?
A. The upper foot and a half, it was squared up quite nicely.
Q. And marked?
A. Yes.
Q. Plainly?
A. Very plainly.
115 Q. Because of the color or indentation?
A. Plainly because of the color.
Q. Was it discolored with the weather or storm-beaten?

A. Very slightly.
Q. Any bark on it at all?
A. Bark at the root, if I remember right.
Q. Did it bear about the same appearance as the stake at the northeast corner, so far as legibility is concerned?
A. It was the plainest of any of them.
Q. Will you take something that will indicate a straight line from the northeast to the northwest corners of that claim, place this on the map so as to show a line between the northeast and northwest corners as you found them (which witness does). This is the point you have marked there?
A. Yes.
Q. Does that indicate the same course of the line as surveyed or shown by that Stemwinder claim as now located?
A. Very nearly the same.
Q. How nearly does the course of the line correspond there?
A. A degree difference; not much more than that. A degree difference between this difference and that.
Q. Not much more?
A. Is not this the point?
Q. That you say would be the line between the two corners as you found them?
A. Yes, as near as I can show with this map. I am not very familiar with this one.
Q. You observe here some marks. State what they indicate, if you know.
A. The original west centre end of the Stemwinder and the original west centre end of the Emma are identical.

Counsel for the plaintiff objects to the defense going into an examination of the Emma stakes. Objection overruled.

Q. You may state what you found in making that survey from which you indicated that point. What do they indicate, if you know?
A. They indicate the relative position of some of the stakes of the Emma, Stemwinder, Bunker Hill, and Last Chance, for that matter.
116 Q. Are they all marked upon that map, those you have mentioned?
A. Some of the various stakes, not all of them.
Q. Some stakes of each of those claims?
A. Yes.
Q. What is indicated at the point to which I am now directing your attention?
A. That mark there is the west centre end of the Emma and also of the Stemwinder.
Q. What is indicated by the point to which I am now directing your attention?
A. The northwest corner of the Emma.
Q. How is it marked upon the map?
A. Marked by a little round dot.

Q. Any lettering to indicate what it is?
A. I think N. W. corner Emma.
Q. How is the corner I last referred to marked upon the map?
A. S. W. corner Emma.
Q. What is the point to which I am now directing your attention?
A. Northwest corner Emma.
Q. Is it so marked?
A. I think it is, as near as I can read it wrong side up.
Q. How is the point to which I am now directing your attention marked?
A. The west centre end of the Emma.
Q. How were those points obtained?
A. By actual survey.
Q. By whom?
A. By myself.
Q. Were they marked to indicate they were at these points on the Emma claim?
A. They were.
Q. Can you remember how they were marked upon the ground; what there was there to indicate——

Objected to by plaintiff as incompetent and immaterial, but objection is withdrawn.

Q. Are they correctly represented upon that map—the relative position.

Counsel for plaintiff objects as incompetent and immaterial.

117 A. I cannot tell you.
Q. Is it not your habit in making surveys to make notes of what are on the corners of the claims?
A. In making them for court purposes, I invariably do.
Q. You did not make any for this suit?
A. I did not. When I made my original survey it was for a totally different purpose from this.
Q. What was the object for making that survey?
A. I made the survey at the instigation of William Parker for the purpose of showing the exact location of a number of claims there. I think the map has been sent to Denver to certain mining parties.
Q. Is that the only time you ever surveyed these points you have testified to?
A. No. I have quite a number of times since and before.
Q. Before?
A. Before.
Q. Did you survey these same corners before?
A. No; not those particular ones.
Q. None of them?
A. Yes; some of the Last Chance corners I have surveyed to before.
Q. The Last Chance corners, but not the Stemwinder corners?

A. Yes; Stemwinder corners.
Q. What ones and where?
A. I have surveyed this corner of the Stemwinder, connecting it with the corner of the Bunker Hill, before.
Q. How long before?
A. It must have been a month and a half, just about.
Q. Did you find it in the same condition at that time, or at the time you made the survey of which you have just spoken?
A. As near as I can judge.
Q. Was there any difference?
A. None that was apparent to my eye.
Q. What was the object of the survey at that time?
A. I was assisting Mr. Miller in making a survey of the Bunker Hill for court purposes.
Q. Did you make notes at that time of the stakes of the Bunker Hill and of all that conflicted in any manner with it? Did
118 you examine any stakes prior to the one of which you have spoken?
A. No.
Q. Ever see any stake of the Stemwinder before this?
A. Yes.
Q. How many?
A. One at Ed. Zeiger's cabin.
Q. What would that be?
A. Northeast.
Q. Was that in the same condition that you found it when you made this survey?
A. I think it was. I did not examine it particularly.
Q. How long before making the survey was it?
A. It must have been a month, anyway; possibly two.
Q. Had it been burned with a fire at that time?
A. It looked just the same—blackened appearance.
Q. What time of the year was this?
A. At the time I made the survey?
Q. Yes.
A. The 6th or 7th of June.
Q. Then, in May, you had seen it before?
A. Yes; possibly a little earlier.
Q. What time did you make the survey for the court proceedings in the Bunker Hill matter?
A. It seems to me it was as early as some time in April.
Q. Have you the note book in which you made your notes at that time?
A. Yes.
Q. Have you that with you?
A. No.
Q. You think it was in April?
A. It was either in April or May.
Q. Was the snow off the ground when you made it?
A. Not entirely.
Q. Was it off the ground behind Zeiger's cabin?

A. Yes.
Q. Was the ground dry?
A. It was practically; it was not muddy.
119 Q. Had there been any fire that spring?
A. I don't think there had.
Q. You were in the habit of being in that gulch frequently during the fall of 1885?
A. Never saw it.
Q. Until the spring of 1886?
A. Until the spring of 1886.
Q. Do you know of any fire passing over it in the spring of 1886?
A. I do not think any fire did.

Plaintiff then offered and had admitted in evidence and had read to the jury what is known as Plaintiff's Exhibit D, being the appointment of George B. McAulay as agent for the Stemwinder Mining Company upon whom process could be served, as provided in section 2653 of the Revised Statutes of Idaho, duly signed and certified by the president and secretary of said company with the seal thereof.

120 REES PRICE, a witness on the part of the plaintiff, being called, sworn, and examined, testifies as follows:

Q. Where do you reside?
A. Between Wardner and Milo.
Q. How long have you resided there, on the South Fork?
A. I have made it my home since September, 1885.
Q. When did you first go into the mining district at Wardner?
A. About the 18th of September.
Q. What year?
A. 1885.
Q. Are you acquainted with the premises known as the Stemwinder mining claim?
A. I was on it the 18th of September.
Q. Then you are acquainted with it?
A. Yes; I was on the claim the 18th of September, 1885.
Q. Who did you see there?
A. Devine.
Q. What Devine—what was his first name?
A. Sandy Devine we call him.
Q. What did you go there for?
A. I was going up the gulch and met him and he told me he had taken up the Stemwinder claim.

Counsel for defense objects to what was told witness and asks to have it stricken out.

A. He told me he had taken up the Stemwinder claim.
COURT: What did you do?
A. I went up with him to see the discovery.
Q. Discovery of what?
A. Stemwinder claim.

Q. What was your purpoae of going up there?

Objected to by counsel for defense as immaterial. Objection sustained, and plaintiff excepts.

Q. What day was it you went up there?
A. The 18th, as near as I can remember.
Q. 18th of what month and what year?
A. September, 1885.
Q. You saw Sandy Devine there?
A. Yes.

Q. As I understand you, you went to the discovery of the
121 Stemwinder with him?

A. Yes.
Q. What did you see at the discovery point?
A. I seen where he had been digging a little and got some galena.
Q. What was the condition of the galena that you saw there?
A. Seems to have been in solid rock.
Q. Was it or was it not rock in place?
A. Yes.
Q. Did he point out to you any notice on the claim?

Counsel for the defense objects to the question as leading. Objection sustained, and plaintiff excepts.

Q. Did he point you out anything upon the claim?

Objection by counsel for the defense to the question as leading and immaterial. Objection sustained, and plaintiff excepts.

Q. What did you see there?
A. I seen a large cliff of rocks; seen a stake and a notice upon it.
Q. Did you at that time read that notice?
A. Yes; I went over it.
Q. Can you state substantially what that notice contained?

Counsel for the defense objects to the question as incompetent to prove the contents of the notice without showing its loss. Objection overruled.

A. Yes.
Q. You read it, did you?
A. Yes.
Q. What names were attached to that notice?

Counsel for the defense objects as calling for part of the contents of the notice without proving its loss and without laying a foundation for it. Objection overruled.

Q. You say you saw a written notice there?
A. Yes.
Q. How far was it posted from the discovery?
A. I don't remember; a few feet.
Q. I will now ask you again if you saw any name attached to that notice?

A. I saw Devine's name.

122 Counsel for defense asks to have answer of the witness stricken out; which motion is granted by the court; to which the plaintiff then and there excepted.

Q. Was there any date on that notice?
A. I don't remember.
Q. Was there a name of a mine on that notice?
A. Yes.
Q. What name did it contain?

Question objected to by counsel for defense as incompetent; which objection is sustained by the court, and plaintiff excepted.

Q. You say you read that notice?
A. Yes.
Q. And you know the contents of it, do you?
A. I remember some of it.
Q. You will state, for the purpose of getting it before the court, what that notice contained, so far as you remember it and ascertained from the reading of it.

Counsel for the defense objects to the question as incompetent; which objection is sustained by the court, and to which ruling the plaintiff excepts.

Q. I will ask you now, did you see any stakes on this Stemwinder claim on that day?

Objection by counsel for defense as leading; which objection is overruled by the court.

Q. Did you see any posts there on that day, on the Stemwinder claim?
A. Yes.
Q. Commence and state what you saw.
A. I saw, as near as I can remember, the northeast corner stake.
Q. Northeast corner stake of what?
A. Of the Stemwinder lode.
Q. Did it have any marks upon it?
A. It had that written on it: Northeast corner stake of the Stemwinder lode, or something to that effect.
Q. Did you see the east centre end stake?
A. Yes.
Q. What mark did that have on it?
A. As near as I can recollect, the east centre end stake of the Stemwinder lode.

123 Q. What was the next stake?
A. I did not see the southeast corner stake.

Q. Have you ever at any time seen it?
A. I have; some time after the 20th.
Q. How long after the 20th?
A. A day or two, or three.
Q. You saw it then?

A. Yes.
Q. Did it contain any marks upon it?
A. It had the same marks as the others had.
Q. This was the southeast corner you speak of?
A. Yes.
Q. What name of the claim did it have?
A. Stemwinder.
Q. You say you saw the discovery; did you see a stake near the discovery?
A. Yes, sir; there was a stake or old tree or something.
Q. Was this notice upon it?
A. Yes.
Q. The notice you speak of?
A. Yes.
Q. How was it, in a conspicuous place or not?
A. As near as I can remember, it was plain enough to see.
Q. How far was it from that reef or cliff of rocks there?
A. It was not but a few feet; maybe from ten to 25 feet; I don't remember.
Q. Did you examine that cliff of rocks there?
A. Yes, I looked at them.
Q. Did you see any vein or evidences of any vein there?
A. I don't understand you.
Q. What did you see there, in that cliff of rocks?
A. I seen galena below it.
Q. What do you mean by below it, at the bottom of it?
A. Yes.
Q. In what condition was the galena when you ascertained it was there?
A. It was solid rock, so far as I could see.
Q. Rock in place, was it?
A. Yes.
124 Q. Did you go up to the west end of that claim on the 18th?
A. Yes.
Q. What did you do up there?
A. I went to take up an extension.

Counsel for defense objects to the question as immaterial.

Q. What did you do when you got up there?

Counsel for defense objects to the question, as witness is not one of the locators and his acts would not be material. Objection overruled.

A. I did not do anything only examine the ground before I thought to take up an extension.
Q. Did you examine the ground on the west end?
A. Yes.
Q. What did you discover there?
A. I discovered nothing to interest me.
Q. Did you see anything there relating to the Stemwinder mining claim?
A. I seen one post or big stump. I don't think it was a whole tree.

A. I saw Devine's name.

122 Counsel for defense asks to have answer of the witness stricken out; which motion is granted by the court; to which the plaintiff then and there excepted.

Q. Was there any date on that notice?
A. I don't remember.
Q. Was there a name of a mine on that notice?
A. Yes.
Q. What name did it contain?

Question objected to by counsel for defense as incompetent; which objection is sustained by the court, and plaintiff excepted.

Q. You say you read that notice?
A. Yes.
Q. And you know the contents of it, do you?
A. I remember some of it.
Q. You will state, for the purpose of getting it before the court, what that notice contained, so far as you remember it and ascertained from the reading of it.

Counsel for the defense objects to the question as incompetent; which objection is sustained by the court, and to which ruling the plaintiff excepts.

Q. I will ask you now, did you see any stakes on this Stemwinder claim on that day?

Objection by counsel for defense as leading; which objection is overruled by the court.

Q. Did you see any posts there on that day, on the Stemwinder claim?
A. Yes.
Q. Commence and state what you saw.
A. I saw, as near as I can remember, the northeast corner stake.
Q. Northeast corner stake of what?
A. Of the Stemwinder lode.
Q. Did it have any marks upon it?
A. It had that written on it: Northeast corner stake of the Stemwinder lode, or something to that effect.
Q. Did you see the east centre end stake?
A. Yes.
Q. What mark did that have on it?
A. As near as I can recollect, the east centre end stake of the Stemwinder lode.

123 Q. What was the next stake?
A. I did not see the southeast corner stake.

Q. Have you ever at any time seen it?
A. I have; some time after the 20th.
Q. How long after the 20th?
A. A day or two, or three.
Q. You saw it then?

A. Yes.
Q. Did it contain any marks upon it?
A. It had the same marks as the others had.
Q. This was the southeast corner you speak of?
A. Yes.
Q. What name of the claim did it have?
A. Stemwinder.
Q. You say you saw the discovery; did you see a stake near the discovery?
A. Yes, sir; there was a stake or old tree or something.
Q. Was this notice upon it?
A. Yes.
Q. The notice you speak of?
A. Yes.
Q. How was it, in a conspicuous place or not?
A. As near as I can remember, it was plain enough to see.
Q. How far was it from that reef or cliff of rocks there?
A. It was not but a few feet; maybe from ten to 25 feet; I don't remember.
Q. Did you examine that cliff of rocks there?
A. Yes, I looked at them.
Q. Did you see any vein or evidences of any vein there?
A. I don't understand you.
Q. What did you see there, in that cliff of rocks?
A. I seen galena below it.
Q. What do you mean by below it, at the bottom of it?
A. Yes.
Q. In what condition was the galena when you ascertained it was there?
A. It was solid rock, so far as I could see.
Q. Rock in place, was it?
A. Yes.
124 Q. Did you go up to the west end of that claim on the 18th?
A. Yes.
Q. What did you do up there?
A. I went to take up an extension.

Counsel for defense objects to the question as immaterial.

Q. What did you do when you got up there?

Counsel for defense objects to the question, as witness is not one of the locators and his acts would not be material. Objection overruled.

A. I did not do anything only examine the ground before I thought to take up an extension.
Q. Did you examine the ground on the west end?
A. Yes.
Q. What did you discover there?
A. I discovered nothing to interest me.
Q. Did you see anything there relating to the Stemwinder mining claim?
A. I seen one post or big stump. I don't think it was a whole tree.

Q. Any marks on it?
A. Yes.
Q. What were they?
A. It was west end centre stake of the Stemwinder.
Q. That was the way it was marked, west end centre stake?
A. Yes.
Q. When did you next see that claim?
A. It was some days after that before I saw any of them stakes—afterwards; three or four days, more or less.
Q. Were you at the discovery at any time subsequent to the 18th?
A. Never.
Q. Never been back?
A. No, not at the discovery.
Q. Three or four days afterwards you say you saw the claim. What part of the claim?
A. The southeast corner stake of the Stemwinder.
Q. Did you see any other stakes afterwards?
A. Not to take notice of them.
Q. Do you know how long those stakes remained there, or are they there yet?
125 A. They were there last year, I think.
Q. What stakes do you refer to now?
A. The east end stake.
Q. Could you mention to the jury about the size of those stakes?
A. No, sir; I could not.
Q. Could you approximate it?
A. Only that they were made as we generally do make stakes, about the right size.
Q. What do you mean by that?
A. Over four inches, and over 4 feet high.
Q. Were they blazed?
A. Yes.
Q. Where was this writing you saw on it, with reference to the blaze?
A. *A.* As near as I remember, the writing was on the west side of the stake.
Q. I mean about the blaze; was it on the blaze or on the bark?
A. On the blaze.
Q. What stakes do you speak of when you say they were on the west side of the stake?
A. The east end.
Q. How was the blaze on the west centre end stake you speak of?
A. It was blazed, as near as I can remember, on four sides.
Q. And this writing you observed on it? Did you see any other writing on it?
A. Not that I remember.
Q. Did you examine it?
A. I examined it enough to satisfy me what it was.

126 Cross-examination:

Q. Describe that post at the west centre end, accurately as you can recollect it.

A. As near as I can remember, it was a big old tree or stub, the top broken off; I don't remember exactly; it was quite large.

Q. What was written on it?

A. The west end centre stake of the Stemwinder lode, as near as I remember it.

Q. Anything else?

A. I don't remember.

Q. Any date?

A. I don't remember any date.

Q. Any names?

A. I don't remember anything of the kind.

Q. You have said you went there for the purpose of locating a claim; did you locate any claim?

A. No.

Q. Did you never locate any claim in the vicinity?

A. Not right there.

Q. How close did you?

A. Oh, maybe half a mile south from there.

Q. When did you locate it?

A. I located that the 22nd, I think. I located another one north from there.

Q. When?

A. On the 21st.

Q. What was the name of that?

A. Sharon then.

Q. Locate any others?

A. One down near Milo.

Q. How close was this Sharon to the Stemwinder?

A. The Sharon joins the north side of the Tyler.

Q. Does it not lie on the same ground as the Tyler?

A. Yes, it overlaps, or did.

Q. Just the same ground included in that as the other?

A. Yes, overlaps, but the Sharon has been run out and re-

127 located by other parties.

Q. At the time you located that Sharon had any other claim been located on that same ground?

Counsel for the plaintiff objects to the question as immaterial. Objection sustained.

Q. Who was with you when you located the Sharon?

Counsel for the plaintiff objects to the question as immaterial and incompetent. Objection is overruled by the court.

A. A man by the name—no; I located it myself, but him and me were partners. I was by myself that day I located it.

Q. Was Mr. Tyler there?

A. He was on the Tyler.

Q. Was he there at the time you located?

A. As near I as remember, I did not know him at that time. Devine was with me. There was one or two more men with him.

Q. Devine was there when you located the Sharon on the ground?

A. Yes, they was ahead of me. I went up to locate where the Tyler is, but they had done it the day before and they was running their lines when I got up on the 21st. They were running their lines on the 21st, on the west end.

Q. You say you went upon the Stemwinder for the purpose of finding ground—in substance that was what you said, was it—to locate?

A. If you will allow me to speak I will explain it to you.

Q. Answer my question.

A. Yes.

Q. Can you identify the point at which you say you saw this paper posted on the Stemwinder?

A. I don't think I could now.

Q. Did you see the posts of the Bunker Hill line at that time?

A. I could not say; I seen the Bunker Hill posts for a day or two after that.

Q. Who went into that gulch with you first?

A. A man by the name of Baird.

Q. Where is he now?

A. I don't know; the last I heard of him he was at Burke.

Q. He was your partner in the location you made?

128 A. Yes.

Q. What day of the month did you say that was that you first went into the gulch?

A. I think it was the 18th.

Q. You think it was; are you sure it was the 18th?

A. No; it was to far gone back.

Q. It might have been the 19th, might it not?

A. So far as my recollection goes, it was the 18th.

Q. Where were you the time intervening between that day and the day you located the Sharon lode?

A. The next day I was up on the Tyler ground. The next day after that I was up on Elk creek, and the next day after that I was on the ground of the Sharon.

Q. Did you see Mr. Kellogg on that ground on either of those days?

A. On the Sharon?

Q. On any ground surrounding these claims on Milo gulch?

A. Yes.

Q. Where did you see him?

A. On a large iron boulder down on Milo creek.

Q. What was he doing?

A. We happened to meet and we sat down, both of us.

Q. What day of the month was that?

A. As near as I can remember, that was the 18th.

Q. Are you as certain that was the 18th as you are that the 18th was the day you went into the gulch?

A. As near as I can remember, I am positive.

Q. Have you ever testified that was the 19th?
A. I might have done it, but then my memory——.
Q. Your recollection two years ago would probably be a little more accurate than now.
A. I can explain about that to you.
Q. Explain it.
A. I was of the idea it was another day until I talked to a certain man, and he said go back to the notices and you can see. That was something I never thought of until that day, and that was lately.
Q. Did you not during the spring following this occurrence testify that was on the 19th?
129 A. No.
Q. Did not you testify to meeting Mr. Kellogg and of the occurrence of his sitting on that boulder, during the trial of Cooper against Kellogg, that it was on the 19th?
A. I might have done it, but I seen my mistake since I got my papers; there is a man here who can testify to what I told him.
Q. What papers did you look at to test your memory?
A. Location of the Sharon.
Q. Where did you say you were on the 19th?
A. I was on the Tyler ground.
Q. What were you doing there?
A. Looking for a location.
Q. Did you see any other person there at that time?
A. Not that I remember.
Q. Did not see Sandy Devine there on the 19th?
A. Not as I remember.
Q. Did not see Tyler there on the 19th?
A. I did not know Tyler at the time.
Q. What time of the day were you there?
A. I was there early in the morning—that is, between eight and 10 o'clock, I think.
Q. Did you stay there after 10 o'clock?
A. I think not.
Q. Where did you go the balance of the day?
A. I went around and followed that ridge on the divide between Deadwood gulch and Milo and around and came down through the gulch again.
Q. Down Milo gulch again?
A. That evening; yes.
Q. Where did you stay that night?
A. My camp was down where Milo is now.
Q. Did you find the ground you desired to locate near the Tyler on that day?
A. My intention was to locate the Tyler.
Q. Why didn't you go back the next day and do it?
A. Because I thought I had plenty of time to go over to Elk creek first.
Q. Did you locate any claims on Elk creek?
130 A. I staked off claims. I found another man's name on the ground and I dropped it.

Q. What time on the 18th was it you were on the Stemwinder ground?
A. That I could not possibly tell.
Q. Was it in the morning or afternoon?
A. I could not hardly tell that.
Q. Where were you on the night of the 17th?
A. Down in Milo gulch.
Q. How far down from this place?
A. Right where Mr. Loring's house is.
Q. What was the first thing you did on the morning of the 18th?
A. Baked *beard* and cooked breakfast.
Q. What time did you go up to this ground?
A. After I had my breakfast I went up.
—. What time of day was it?
A. That I could not tell you on account I had to climb so many logs. It would take quite a time to go up there.
Q. Was it in the afternoon?
A. I think not.
Q. You think it was in the forenoon?
A. It might be forenoon, all I know.
Q. Did you see Sandy Devine as soon as you went up that gulch?
A. I saw him pretty soon after that.
Q. Did you go directly on his ground?
A. Yes.
Q. Did you go directly to where the notice was?
A. Within an hour or so, or less, I had a talk with him.
Q. Did you see Mr. Kellogg before you went to this notice?
A. Yes.
Q. Did you go to the Bunker Hill discovery first?
A. No.
Q. Did you go to it on that day?
A. I think I did, but am not positive.
Q. Did you not date the notice of the Sharon as of the day you first went upon the ground with the intention of locating it?
A. No.

131 Q. Were you not closely questioned as to the day upon which you saw Kellogg sitting upon that rock, on the occasion I speak of, when you testified to its being the 19th?

A. That was *wneh* I made the mistake on account I had forgotten, but my papers showed me different.
Q. It was a very material *wuestion* then, was it not?
Q. I answered then as near as I knew how, and I do the same to-day.
Q. What kind of a mark or stake did you see at the southwest corner on the 18th—what was it?
A. On what claim?
Q. On the Stemwinder.
A. I never seen any southwest corner.
Q. Well, at the southeast corner?
A. I did not see that the 18th.
Q. Well, at the northeast corner?

A. I don't remember what kind of a stake it was.
Q. Was it a tree or stake?
A. It seems to me it was a tree—a small tree.
Q. It seems to you?
A. I am not positive.
Q. What is the character of your recollection as to what it was marked—is it distinct, your recollection?
A. As near as I remember, it was marked the northeast corner of the Stemwinder lode.
Q. Did it have any dates or names on it?
A. Nothing but the name of the lode and description.
Q. Was it a green stake or an old one?
A. As near as I remember, it was burned; it may not be.
Q. It was burned. Was the face of it burned where it was hewn?
A. Not where the name was.
Q. Was it written in a large or small hand?
A. Not very large.
Q. What kind of a pencil-mark—a black lead pencil?
A. I cannot tell; it is too far gone.
Q. Then your recollection is not minute or in detail?
A. Not as to the color of the pencil; it was the general color, blue or black.
Q. You think it was a burned stake?
A. I am not positive; I think it was.
132 Q. Was it hewn squarely?
A. That I am not positive; only I am almost sure it was squared off on both sides, but whether it was squared off, hewn, or not I am not positive.
Q. You say you saw the one at the southeast corner—the 21st or along about it?
A. Along about that.
Q. What kind of a stake was that?
A. That I am not posotive of.
Q. Was it a burned stake?
A. I am not positive what it was.
Q. Was it a green stake?
A. That I cannot tell.
Q. Was it a tree?
A. It was a stake, as near as I can remember.
Q. How large was it?
A. That I don't remember.
Q. Do you remember what it was marked?
A. I remember seeing the name Stemwinder lode on it.
Q. Any dates or names?
A. No; not that I remember.
Q. You say you saw these stakes there last year?
A. I think I did.
Q. You think so?
A. Yes.
Q. Have you any recollection on the subject at all?
A. Nothing particular.

Q. Then what makes you think you saw them there last year?
A. As I went up by I happened, as near as I remember, to take notice of them.
Q. What was written on them then?
A. I did not take notice of the writing on them then?
Q. Did you see the southeast corner at that time?
A. I would not be certain whether I seen the southeast corner or not.
Q. Then your recollection is very indistinct on the subject?
A. On that.
Q. That was only a year ago?
A. Yes.
133 Q. You went from Murray to Milo gulch in 1885?
A. Yes.
Q. What time did you leave Murray—the day of the month?
A. That I could not tell you exactly.
Q. Why cannot you remember that date if you can remember the others?
A. Well, I can bring my memory to it with my own locations, but I never thought of it.
Q. Where did you go from Murray?
A. I went the first day as far as Jackass Prairie.
Q. Went clear through the first day?
A. Yes.
Q. What day of the month was that?
A. As near as I remember, it must be the 17th.
Q. Did you go up Milo gulch the next day immediately?
A. Yes.
Q. Who was with you when you went from Murray?
A. Nobody.
Q. Who did you stay with at Jackass Prairie that night?
A. One Charles Baird.
Q. Anybody else in camp?
A. There were some packers below us.
Q. Any other miners or prospectors in camp?
A. No.
Q. Did you see any that night?
A. No.
Q. Did you see any the next morning on your way to Milo gulch?
A. I don't remember that I did—only Tom Erwin.
Q. You saw Tom?
A. Yes.
Q. Where did you see him?
A. I *see* him first at Lee's house.
Q. That was at Jackass Prairie, was it not?
A. Yes.

134 Redirect examination:

Q. You were asked about the date of your Sharon notice; have you got it with you?
A. Yes.

Q. Let us have it (paper shown counsel). Is this the notice to which you refer?
A. Yes; that is a copy of it we put on record.
Q. Who wrote that notice?
A. A man by the name of Charles Baird.
Q. What day?
A. I would not be certain what day he wrote that.
Q. What day did you put the notice up?
A. I put up the notice on the 21st, but we had 15 days to copy it off and bring it over here.
Q. Whose handwriting is this?
A. Charles Baird.
Q. That is your partner?
A. Was then.
Q. When you referred in your examination to the date you put up that location notice, is that the one you referred to?
A. Yes.
Q. Does it bear proper date?
A. Yes.
Q. See what date it bears.
A. September 21st, 1885.

Counsel for plaintiff then produces the Sharon notice of location for examination, referred to by the witness, that bore date September 21st, 1885.

Q. Is that the paper you referred to in your examination as the proper date?

Counsel for the defense objects to the question as immaterial. Objection overruled.

A. That is the paper that I referred to that I might have made a mistake when I was on the stand before, because I never thought of the date only from my memory, but a certain man put in my mind about the location notice; then I could trace it back to the very day.

135 JOSEPH CLEAVER, a witness on the part of the plaintiff, being introduced, sworn, and examined, testified as follows:

Q. Where do you reside?
A. This side of Milo gulch.
Q. Are you acquainted with S. R. Devine, commonly called Sandy Devine, and J. T. Smith and W. P. Tyler?
A. I am.
Q. When did you first become acquainted with them?
A. Some time in September, 1885.
Q. Are you acquainted with the mining location known as the Stemwinder lode, in Yreka mining district?
A. I am.
Q. When did you first become acquainted with that?
A. About the 20th of September, 1885.
Q. When did you first go to Milo gulch?

A. About that date.

Q. I will ask you to state whether or not you were upon the ground of the Stemwinder at that time.

A. I passed by it at that time.

Q. Who, if any one, did you see there at that time?

A. I remember of seeing Charles Tyler, one of the partners.

Q. Who was he?

A. He seemed to be one of the partners in the claim.

Q. Is his name J. P. or C. P.?

A. Charley Tyler.

Q. See any one else there?

A. I am not positive, but I remember of seeing Sandy or S. R. Devine there some time. I cannot remember the date that was, though it may have been a day or two after. It was not before; it was after.

Q. I will ask you to state what, if anything, you saw at that time indicating a location of the Stemwinder claim when you saw it and described accurately what you saw at that time.

A. That was about the 20th of September.

A. Yes.

A. I saw the east end stakes and I suppose the centre stake.

136 Q. Will you describe those stakes and what was on each of them, respectively, as near as you can?

A. I remember seeing the east end centre stake, that was situated very close to Charles Tyler's camp; I could see that from his camp.

Q. Do you know where Sandy Devine and Tyler and his partners afterwards built a cabin, commonly known as Devine's cabin?

A. That is the same place I speak of.

Q. Where was this stake, with reference to this tent or cabin?

A. It was south, and possibly a little to the west of it.

Q. How frequently did you see that stake afterwards, and what was there peculiar about it that attracted your attention to it?

A. I saw it often enough—every day I passed; it was close there, about 20 feet away; possibly more.

Q. Were you at any time camped near it?

A. I was camped near by and used it as target different times to shoot at.

Q. In shooting at it as a target how frequently did you go to the stake to see what was the effect of your shots?

A. I don't know as I am a very good marksman; I went there often enough; the effect was not as much as I expected.

Q. Describe the other stakes you saw at that time.

A. The northeast corner stake stood down the creek, I did not notice it often enough; though I passed it as close by as the rest, I did not notice it as often as the rest.

Q. You saw the stake?

A. I saw it.

Q. What kind of a stake was it?

A. It was a stake 4 or 5 feet high; it was planted in a mound of rocks.

Q. Did you ever examine the marking-, if any, on that stake?

A. I don't think I did.

Q. Did you see any other stakes on the east end, except the northeast corner take?

A. I saw the southeast corner stake.

Q. Describe that.

A. That stood below the bluff of rocks, and a little to the southeast of it; it was a tamarack or red fir tree about 5
137 inches through and blazed very slightly on three sides. I don't think the lower side was blazed at all.

Q. Do you think it was a tree? Was there anything done on the tree?

A. It was cut off.

Q. What had been done in the way of squaring the tree?

A. I think three sides of it was blazed.

Q. How was it marked, if you noticed?

A. I remember the handwriting and the marking on that, but I don't remember the wording of it; I remember it was marked, but the impression is on my mind it was the southeast corner.

Q. Of what?

A. Of the Stemwinder.

Q. Can you say positively as to whether it had the name of the Stemwinder on it?

A. Yes, the name Stemwinder, I remember that; it was written in rather a boyish hand; it seemed like a schoolboy's hand.

Q. That is to say, it was a little irregular?

A. It was plain enough.

Q. You say it was a tamarack?

A. Tamarack or fir; it was hard wood.

Q. When were you next on that ground?

A. The next day.

Q. State what, if anything, you did there on that day; who, if anybody, was with you; and what, if anything, you saw in the way of a location of that claim.

A. I have stated what I saw of the location and what I have done. I did not do anything that day.

Q. What did you see, then, on the 21st—that was the next day—upon that ground?

A. I went up to the upper stakes.

Q. Who was with you, if any one?

A. O. O. Peck and Charles Tyler.

Q. You went up, you say, to the discovery?

A. Went up to the discovery.

Q. State what you saw there at the discovery.

A. I saw a bluff of rocks above the discovery with staratified mineral all through it.

138 Q. How high a bluff of rocks was that?

A. I cannot state positively.

Q. I am speaking from the base of the bluff to the top of it.

A. In a perpendicular line?

Q. Yes.

A. I suppose about 25 feet; maybe only 20.

Q. What did you say you saw running through that bluff?
A. Stratified galena.
Q. How was that galena situated, with reference to this rock?
A. Running right through it, rather peculiar.
Q. What have you to say as to this bluff of rocks being part of the solid formation of the mountains or otherwise?
A. Could not be anything else but solid formation.
Q. State whether this galena you saw was rock in place or not.
A. It was in place.
Q. How near was that bluff of rocks to the—did you see anything there in the way of a notice there at that time?
A. No notice.
Q. I will ask you whether or not you looked for it.
A. I did not look, even.
Q. You was looking at the galena?
A. I was looking at the galena; that attracted my attention at that time.
Q. Did you see any digging done there at that time?
A. Not very much.
Q. Where was that digging, with reference to this cliff of rocks?
A. Right at the foot of it.
Q. Do you remember whether or not there was any stake there?
A. I remember seeing a stake below the excavation; maybe 20 feet away from it, maybe not so far; I cannot state now; did not go to it.
Q. You paid no attention to that stake?
A. No; a little below and to the north of it.
Q. Did you have any conversation with Mr. Tyler at that time?
A. I don't know as I had.
Q. Or hear any conversation with Mr. Tyler at the time, with reference to this discovery?
A. I was not spokesman of the party; I heard conversation enough al out it.

Q. Did you hear any conversation with him at that time—
139 at the time you went upon the ground—with reference to the discovery of the Stemwinder?
A. I heard a remark made.
Q. State what that was.

Counsel for the defense objects to the question as incompetent. Objection sustained by the court; to which ruling the plaintiff excepted.

Q. State whether or not you saw any other stakes on the 21st of September, 1885, marking the boundaries of this claim; and, if so, how you came to see them, where they were situated, and how they were marked.
A. I saw two more stakes; inspected the other one—looked at the other one close.
Q. How did you come to see them?
A. I happened to follow the course of the vein, as I supposed it run, and got close enough to them to see them; pointed out to me by Mr. Tyler.

Q. Where were those stakes situated?

A. They were situated in the northeast part of the discovery and one of them to the west; I don't suppose it was very much to the south of it.

Q. State what you saw upon those stakes, if anything; describe the stakes.

A. I only saw one that I could describe any writing on.

Q. What stake was that?

A. That was the southwest corner.

Q. What kind of a stake was it?

A. That was a stake driven into the ground.

Q. How high was it, and how large?

A. About 4 or 5 inches through, and 4 or 5 feet high. That was marked in the same handwriting as the other one was below; Stemwinder was on that also.

Q. What marks were on it to designate it as the corner, if anything?

A. I cannot state what marks there was on it; it created an impression on my mind that it was——

Counsel for the defense objects to the impression of the witness being taken.

Q. What is your recollection as to what was written on that stake?

140 A. Stemwinder claim or lode.

Q. Anything to indicate the corner?

A. The corner must have been marked, else I could not state it was a corner.

Q. What corner was it?

A. At that time I considered it the southwest corner.

Q. What caused you to consider it as the southwest corner?

A. It must have been marked so.

Q. Did you see any other stakes at that end of the claim?

A. I saw what was supposed to be the centre end stake; it was a tree, I think.

Q. What caused you to suppose it was the centre end stake?

A. I was told that was it.

Q. Was that pointed out to you by anybody; if so, by whom?

A. Counsel for the defense objects to the question as hearsay if the witness did not go to it. Objection sustained by the court; to which ruling the plaintiff then and there excepted.

Q. Where was that stake situated with reference to the one you have described as the southwest corner stake?

Counsel for the defense objects to the question as immaterial, but objection is afterwards withdrawn.

Q. This other stake you say you saw, which was a tree or stub, how far was it from this southwest corner stake, and in what direction?

A. I could not state the distance, but in a northerly direction.

Q. About how far?

A. The width of a half a claim, as a man would lay it off.
Q. What distance do you mean by that?
A. 300 feet; it may have been less.
Q. Describe that stake. How was it marked?
A. It is pretty hard to describe. It was a tree about 12 or 14 inches through, and I believe it was broken off on top, but it had some limbs on.
Q. Dead or alive?
A. Dead, slightly rotten.
Q. What did you see on it in the way of marks?
A. Did not see marks, not close enough to it.
Q. What did you see on it in the way of blazes?
141 A. It was blazed on the sides I saw.
Q. How many sides did you see of it?
A. About three sides, I guess; did not see the upper side; did not go above it.
Q. About how high from the ground were those blazes?
A. I cannot tell.
Q. About how high?
A. From three to five feet, as a man would measure them.
Q. Did you see any other stake near that end of the claim?
A. I saw a stump that was cut off. That was pointed out to me also.
Q. Pointed out to you, was it?

Counsel for the defense objects to the question as immaterial.

Q. Who was it pointed out to you by?

Counsel for the defense objects to the question as immaterial.

A. It was pointed out to me by Mr. Tyler.
Q. Where was that stake situated with reference to the stub you have described as being blazed on three sides?
A. That was to the northward of it.
Q. And about what distance from the stub?
A. About 300 feet.
Q. State how those three stakes or the two stakes and the stub you have described were situated with reference to being in line or not.
A. I cannot state whether they were in line or not.
Q. As to being north, say, then?
A. They might have been some out of line, but it went over the ridge and a man could not tell positively which way they were; they may have been perfectly in line and might have been fifty feet out of the way; I cannot tell.
Q. If this stake you say was marked the southwest corner of the Stemwinder lode was the southwest corner stake, state as to how those other two stakes or this stub and other stake was situated with reference to that end line of the claim.

Counsel for the defense objects to the question as calling for the conclusion of the witness.

COURT: State how they were situated and where they were situated.

142 Q. State what other stake, if any, you saw in the vicinity of the southwest corner atake of the Stemwinder.

A. I saw the northwest corner stake of the Bunker Hill, about 25 feet distant; it might have been more.

Q. In what direction?

A. That was in a southeasterly direction—more easterly than southerly.

Q. Down the hill?

A. Down the hill.

Q. Have you ever had occasion to see those stakes since that time?

A. I have seen some of them.

Q. Which ones?

A. I saw all the east end stakes—saw them frequently—and I seen the discovery stake.

Q. You speak of the south or the northeast corner stake as not having gone to it on the 20th. Have you at any time since gone to that stake?

A. Not to read any inscriptions.

Q. Have you at any time since the 21st of September seen any of the west end stakes?

A. I seen the southwest corner stake often.

Q. That is the one you say was near the Bunker Hill northwest corner?

A. Yes.

Q. Did you see any other stakes on the west end?

A. I saw them but never went to them.

143 JOHN KING, a witness on the part of the plaintiff, being called, sworn, and examined, testified as follows:

Q. Where do you reside?

A. Wardner, mostly.

Q. How long have you resided there?

A. Since the fall of 1885.

Q. When did you first go into the Yreka mining district?

A. Something about the 21st or 22nd of September, 1885.

Q. Did you have occasion at that time to go upon the Stemwinder mining claim?

A. I was.

Q. About what date?

A. I think it was the 22nd; I am not sure as to the date; I think it was.

Q. It was not later than that?

A. No; I don't think it was.

Q. Did you see any one upon the claim?

A. I saw Sandy Devine and Charles Baird.

Q. Do you know where Sandy Devine is now?

A. In the Kootenai country, British Columbia.

Q. How recently?

A. About three weeks ago.

Q. Is he in Shoshone county, that you know of?
A. Not that I know of.
Q. Where does he live at present?
A. I don't know where he lives at present; about three weeks ago he lived in British Columbia.
Q. Where was his place of business?
A. In British Columbia.
Q. Do you know what business he is in?
A. He is in the dry-goods and grocery business and mining, I believe.
Q. Has a store?
A. Interested in a store; yes.
Q. You know wheth- Mr. Tyler is in the country or not?
A. I don't know that he is; I have not heard of him for a long time.
Q. When did you last see him?
A. I think about 18 months ago.
144 Q. How about Mr. J. P. Smith?
A. The last I heard of him was about two months ago; he was at the Hot Springs, Arkansas.
Q. Are you acquainted with all three of these gentlemen?
A. Yes.
Q. How long have you known them?
A. I have known them 4 or 5 years.
Q. You know about the time Mr. Devine left this country?
A. I don't remember the time. It has been 18 months or a couple of years, probably.
Q. You say when you went on the Stemwinder claim; about the 22nd of September, 1885, you saw Devine there?
A. Yes.
Q. Do you know who was the locator of the Stemwinder?

Counsel for the defense objects to the question as incompetent; which objection is sustained by the court; to which ruling the plaintiff then and there excepted.

Q. Do you know the name of the original locator of the Stemwinder mining claim?

Counsel for the defense objects to the question as incompetent. Objection sustained by the court; to which ruling plaintiff then and there excepted.

Q. Do you know Sandy Devine?
A. Yes.
Q. Did you know him on the 22nd of September, 1885?
A. Yes.
Q. Where was he when you first saw him there that day?
A. He was working on his claim on the Stemwinder.
Q. What was he doing?
A. He was digging out some ore.
Q. Did you see the point of discovery?
A. I did.

Q. Describe to the jury what you saw there.
A. I saw a notice there; saw where they had been working, taking out a little ore.
Q. What kind of ore?
A. Lead ore—galena.
Q. How was it situated with reference to formation?
A. It was a little loose where they was working; not solid where they was working.
145 Q. You saw the ore that was taken out?
A. Yes.
Q. Where was the notice located?
A. It was located a little below where they was working.
Q. Where was the notice located?
A. Below the point where they was working.
Q. How far?
A. Probably 30 or 40 feet.
Q. What was that notice on?
A. On a post.
Q. What kind of a post?
A. I did not notice the post in particular, but it was a post set up there with some rocks around it.
Q. Did you read the notice?
A. Yes.
Q. What did the notice purport to be?

Counsel for the defense objects to the question as incompetent; which objection is sustained by the court, and to which ruling plaintiff then and there excepted.

Q. Was there a name in the notice?

Counsel for the defense objects to the question as incompetent; which objection is overruled by the court.

A. Yes.
Q. Was there a date to that notice?
A. Yes.
Q. Was there a name of a mine to that notice?
A. Yes.

Counsel for the defense moves to strike out the answers of the witness as proving the contents of the notice. Objection overruled.

Q. Now, I will ask you what name you saw appended to the notice you saw on this stake?

Counsel for the defense objects to the question as incompetent. Objection sustained by the court; to which ruling plaintiff then and there excepted.

Q. Do you know what became of that notice you saw on that stake?
A. I do not.
Q. You saw it on the 22nd?
A. Yes.

Q. When were you back there again?
146 A. A week or ten days afterwards.
Q. Was that notice there then?
A. No.
Q. Was there another notice there?
A. There was.
Q. Where was it?
A. About the same place.
Q. What was it on?
A. It was on a hewed stake; written on the stake and not on paper.
Q. Lead pencil?
A. Yes.
Q. And the original notice you first saw there was gone?
A. Yes.
Q. What kind of weather had you had in the interim?
A. Pretty hot, dry weather—windy weather.
Q. Windy?
A. Dry and hot; yes.
Q. Hadn't there been a rain in the meantime?

Counsel for the defense objects to the question as leading. Objection overruled.

Q. Was the same stake there that had the first notice on?
A. I did not see it; no, sir.
Q. What was the first notice on? Explain that again.
A. It was on a common ordinary stake.
Q. The next time you were there was about a week after?
A. Week or ten days; something like that.
Q. Then the notice you saw was written with a lead pencil upon a stake that was hewed?
A. Yes.
Q. How long did that notice remain there?
A. Remained there quite a while; don't know how long.
Q. Of your own knowledge, about what time?
A. I believe last summer some time was the last I saw it, or last fall.
Q. That was the last time you had seen it?
A. Yes.
Q. It was at the same place the last time you saw it?
A. The same place.
Q. Did you examine the contents of this last notice?
147 A. I read it about the same as I did the first one.
Q. Was there a name attached to that notice?
A. Yes.
Q. Was the name of a mine contained in it?
A. Yes.
Q. The date, was that on it?
A. Yes.
Q. What name was attached to it?

Counsel for the defense objects to the question as incompetent; which objection was sustained by the court; to which ruling the plaintiff then and there excepted.

Q. What name of a mine was in that notice?

Counsel for the defense objects to the question as incompetent. Objection sustained by the court; to which ruling the plaintiff excepted.

Q. And what was the date?

Counsel for the defense objects to the question as incompetent. Objection sustained by the court; to which ruling the plaintiff then and there excepted.

Q. This written notice you first saw there, when you returned it was gone?

A. Yes.

Q. Have you ever seen that notice back on the claim from that day to this?

A. No.

Q. You have been there frequently?

A. Been there very often.

Q. You have never seen that it was there?

A. Never saw it.

Q. Never saw it since.

A. No.

Q. Do you know Mr. King? What has been your business for a few years last past?

A. Mining.

Q. Prospecting?

A. Yes.

Q. Have you frequently during that time located mining claims?

A. Yes; located a few.

Q. Posted notices?

A. Yes.

148 Q. For how long a period of time have you been in that business?

A. About 14 years.

Q. Have you ever had experience and observation as to how long the original notices stay on the claims on which they are posted, from the effects of the weather or various effects of the elements?

A. Yes; I have noticed it frequently.

Q. What is your experience in that matter?

Counsel for the defense objects to the question as incompetent. Objection overruled, and defendant excepts.

A. It is a good deal according to the weather. They will stay up a week sometimes, and sometimes they won't. On the north side of a tree they will stay up two or three years.

Q. Then it is the protection it has from the wind and the weather?

A. Yes.

Q. And the class of weather you have?

A. Yes.
Q. That, of course, did not take into consideration the taking down of notices physically by persons?
A. No.
Q. When you went back there this other notice was gone?
A. Yes.
Q. You read the notice you saw on the stake?
A. Yes.
Q. Do you remember substantially the contents of either of those notices?
A. I remember the dates and names; I believe about the size and length and width of the claim is about all.
Q. About the first notice that was gone when you went back—have you ever seen that since?
A. No.
Q. Will you please state now what name was attached to that notice?

Counsel for the defense objects to the question as incompetent; which objection is sustained by the court, and to which ruling plaintiff then and there excepted.

Q. Did you see any stakes at that time of the Stemwinder?
A. I saw one, I believe.
149 Q. Which one?
A. The southwest corner.
Q. Where was that, with referenee to the Bunker Hill?
A. It was very close to it—to the northwest corner of the Bunker Hill.
Q. How was that stake marked, if at all?
A. Southwest corner of the Stemwinder.
Q. What was the writing on that stake?
A. Marked southwest corner of the Stemwinder.
Q. Did you afterwards see any stakes marked on the Stemwinder anywhere?
A. I saw them after that some time; yes.
Q. When?
A. Probably a week or ten days after.
Q. State what you saw.
A. I saw two upper end stakes afterwards.
Q. How were they marked and what stakes were they?
A. One was marked west centre end stake, and the other the northwest corner of the Stemwinder.
Q. Did you know the handwriting on them?
A. No.
Q. Did you see any stakes marking the east end of the Stemwinder?
A. I did when I was back the second time, afterwards.
Q. State what you saw there.
A. I saw three of those stakes.
Q. How were they marked?

A. Marked the northeast corner of the Stemwinder, the east centre end, and the southeast corner of the Stemwinder.

Q. How far were they apart?

A. I suppose about 300 feet, as near as a prospector could put it. I did not measure it.

Q. That was the appearance?

A. Certainly.

Q. How far was it from the northeast to the northwest corner on the east end line—the southeast, I should say?

A. About 600 feet. I did not measure it.

Q. About that?

A. Yes.

Q. How was the centre east end stake marked?

A. East centre end of the Stemwinder.

150 Q. How frequently have you seen those stakes since?

A. I have seen them, off and on, very often for a while.

Q. Up to what period?

A. Along late last fall.

Q. Do you mean to say they have been continuously there from the first time you saw them?

A. Yes.

Cross-examination:

Q. Q. When did you last see Sandy Devine?

A. It has been probably three months.

Q. Where was he then?

A. In the Kootenai country.

Q. When did you last see him in this territory?

A. I have not seen him, I think, for a year.

Q. Did you communicate the fact that you had seen him in the Kootenai country three months ago to Mr. Hagan or parties to this suit?

A. No.

Q. Never told him you had seen him there?

A. I might have told him in common conversation; that would be all; I don't remember of even having done that.

Q. Ever tell Mr. McAulay that you had seen Mr. Devine three months ago in the Kootenai country?

A. I probably have; I don't remember.

Q. When did you last see Tyler?

A. I don't remember; 18 months, or about that, since I saw him

Q. Where was he then?

A. In Wardner. I don't say positively; it might have been two years or a little less than that.

Q. When did you last see Mr. Smith? How long have you known of the fact where he was?

A. I only heard that he was at the Hot Springs two months ago.

151 GEORGE B. MCAULAY, a witness on the part of the plaintiff, being called, sworn, and examined, testified as follows:

Q. Do you know what is known as the Stemwinder mining claim?

A. Yes.

Q. How long have you known that?

A. Known it since April, 1886.

Q. Did you ever work on the claim?

A. Yes.

Q. When?

A. I have been working on it last year; this year some work.

Q. Did you work there in 1886?

A. No.

Q. Did you go over that claim in 1886?

A. Yes.

Q. Did you see any stakes of the Stemwinder?

A. Yes.

Q. What stakes did you see?

A. The first stakes I saw of the Stemwinder was—the first stake after seeing the stake that the discovery was written on was the northwest corner.

Q. How was that marked?

A. It was marked northwest corner of the Stemwinder mine.

Q. Did you see any of the others?

A. Yes.

Q. State how they were marked.

A. I saw the west centre end stake, the southwest corner, the southeast corner, east centre end, and the northeast corner.

Q. Are they standing there yet?

A. Well, I saw them all last fall, some time in August, and I have seen some of them most every day—all of the stakes at the east end.

Q. Where are the stakes at the east end—which side of the creek as you go up?

A. They are on the west side of the creek.

Q. Where with with reference to that map behind you, Mr. McAulay, about? I don't suppose you know the scale of the map.

152 A. The creek is not marked on this map. The original stakes were down here somewhere, I should judge.

Q. Where were those with reference to that map on the west end, about?

A. They were up here.

Q. You have seen those stakes?

A. Yes.

Q. How often have you seen them?

A. I don't know; I have seen them a great many times. In April and May, 1886, I saw them once or twice. When I was around the gro-nd I saw them every day, and seen them a great many times since.

Q. I will ask you now as to whether this ground in controversy between the Emma & Stemwinder is within or without the boundaries marked by those stakes.

A. Within the boundaries marked by those stakes.

Q. Did you ever see the notice of location on that claim; if so, when?

A. I saw a notice of location written on a stake; I saw that in April, 1886, and have seen it every few days from that time until now.

Q. Have you read it?

A. Yes; read it a great many times.

Q. Know the contents of it?

A. Well, I do; yes, substantially.

Q. Do you know the condition of that notice now?

A. I have not seen the stake for some time. The last time I did see it the writing was getting obliterated so that it was pretty hard to make it out; some of it was distinct.

Q. Some of it distinct and some of it obliterated?

A. Yes.

Q. (Paper shown witness.) Do you know whose handwriting that notice is?

A. Yes.

Q. Whose is it?

A. S. R. Devine's.

153 Q. Did you ever see a duplicate or copy of this notice on the claim?

Counsel for the defense objects to the question on the ground that in order to determine whether it is a duplicate is equivalent to testifying to its contents; also as incompetent. Objection sustained by the court; to which ruling plaintiff then and there excepts.

Q. Where was this notice posted that you saw on the claim? I should first ask you, how do you know it was a notice?

A. It purported to be a notice.

Counsel for the defense objects to the question as incompetent and asks that the answer be stricken out.

Q. How many times had you read that notice?

A. I read it a great many times; I don't know now just how many times; I presume I read that notice twenty times; went there purposely to read it, and read it twenty times during the last two years.

Q. Do you know of another notice being put up on that claim afterwards?

A. Yes.

Q. I will show you that notice. (Paper shown witness.) Do you recognize that notice?

A. Yes.

Q. What is it?

Counsel for the defense objects to the question because the contents will speak for itself. Objection sustained by the court; to which ruling plaintiff excepts.

Q. Which notice do you refer to, that I have handed you?

A. That is a copy of the amended notice of the Stemwinder.

Counsel for defense asks to have the answer of the witness stricken out as incompetent; which motion is granted by the court; to which ruling the plaintiff then and there excepted.

Q. When you refer to the notice you saw on the stake do you mean a notice that was on paper or wood?
A. Written on wood.
Q. Did you see any notice written on paper there?
A. No.
Q. Who has been in possession of that mine, within the stakes marked out there, since March last?
A. Stemwinder Mining Co.
Q. What have they been doing there?
154 A. Mining, running tunnels, and taking out ore.

Counsel for defense objects to anything more being stated than the assessment work required to be done.

Q. When did the Stemwinder Mining Company go into possession of that claim?
A. In March, 1887.
Q. Who has been in possession ever since?
A. The Stemwinder Mining Company.
Q. How much work have they done and performed on that claim from the time they went into possession?

Counsel for the defense objects to the question as incompetent and irrelevant. Objection overruled.

Q. What have you done on that claim since the 11th of March, 1887, when you say the Stemwinder Mining Company went into possession?
A. We have been running tunnels, drifts, sinking shafts to the extent of some 40 or 50 thousand dollars.
Q. Underground work?
A. Yes.
Q. Are those works within the limits of the claim as shown on that map?
A. Yes.
Q. Who is in possession now?
A. Stemwinder Mining Company.
Q. Has their possession from the 11th day of March, 1887, been continuous or otherwise?
A. Been continuous.
Q. I understood you to answer awhile ago that you had never seen this notice that was on the paper from your first acquaintance with the mine until the present time.
A. I did not see no notice on paper.
Q. Have you had it in your possession?
A. No.
Q. Is it in the possession of any agent or employee of the plaintiff, The Stemwinder Mining Company?

A. Not to my knowledge.
Q. What position have you occupied regarding the plaintiff during this time?
155 A. I was in charge of the mine.
Q. Its manager?
A. Yes.
Q. Have you ever had possession of it or known of its whereabouts?
A. No.
Q. Has any officer or member of the corporation ever had it or known of its whereabouts, to your knowledge?
A. No; not to my knowledge.
Q. Have you or any member of the corporation ever known of the existence of that paper or notice?
A. No; I don't know it, and don't know anybody that did.
Q. Have you made any inquiries about it?
A. No; I did not. I always was under the impression that the——

Counsel for the defense objects to impressions being stated; which objection is sustained by the court.

At this time court adjourns until to-morrow morning, September 26th, 1888, at which time, all parties being present, the trial of this case was resumed, and the examination of Mr. McAulay is continued, as follows:

Q. When court adjourned I was asking you about a notice that was on a stake on the Stemwinder ground. Have you sent for that stake?
A. Yes.
Q. Have you got it in court?
A. Yes.
Q. Can you produce it? (Stake produced.) Is that the stake you referred to as the notice being on that you had seen so often?
A. Yes.
Q. Where did that stake stand?
A. It stood on the claim, about 300 feet from each side of the claim.
Q. According to th-t map?
A. It stood at this point there.
Q. What is that mark?
A. 4.
Q. When did you first see that stake?
A. In April, 1886.
156 Q. How long has that stake remained there?
A. It has remained there from then until until it was taken down yesterday.
Q. Is that the stake you referred to as having read the notice?
A. Yes.
Q. Have you examined it this morning?
A. Yes.
Q. Can you read the notice that was on it now?

A. Some words of it, but not very distinct.
Q. What is the cause; why don't you read it?
A. The writing is obliterated by the weather, and it is getting so dim I cannot read it; that is all.
Q. You can make out a little of it?
A. Yes.
Q. How often did you say you read that notice in former times?
A. I could not tell exactly—a number of times; but I read it at least 20 times.
Q. Are you familiar with what the notice contained when it was legible so you could read it?
A. Yes.
Q. I will ask you to state to the court and jury what was written on there at the time it was legible so you could read it?

Counsel for the defense objects to the question, and the court allows counsel to cross-examine first *first* on this point as follows:

Cross-examination:

Q. When did you first see that post on the ground?
A. In April, 1886.
Q. How was it fastened on the ground?
A. On a rock with a mound of rocks around it.
Q. Standing on end?
A. Standing on end; yes.
Q. With a mound of rocks around it?
A. Yes.
Q. Was there any paper notice posted on it?
A. No.
Q. When did you last read the contents of that notice?
A. It was about a year ago; I cannot tell exactly the date.
157 Q. You say you have read it twenty times?
A. Yes.
Q. What was there about that notice which induced you to read it 20 times?
A. The first few times I read it was to see what kind of a notice they had on the claim, what they claimed, and what called me to read it after that was the showing to other parties on the claim.
Q. You think you read it twenty times?
A. Yes.
Q. Were you working at that particular point?
A. No.
Q. When did you first become interested in this mining claim?
A. In March, 1887.
Q. How many times did you read it before you became interested in the claim?
A. Three or four times, I should judge.
Q. Then, at least 17 or 18 times you have read it since March, 1887?
A. Yes.
Q. That is a year ago this March?

A. This last March; yes.

Q. Was it perfectly distinct at all times you read it?

A. It was distinct so I could read it very easily—anybody could read it.

Q. Was it as distinct when you read it in March, 1887, as it was when you read it in the spring of 1886?

A. I don't think it was; it was very distinct when I read it first.

Q. But it was perfectly legible when you read it the last time?

A. It was legible so I could read it very well. It was written in a legible hand, so there was no difficulty in reading it.

Q. You undertake to say you rememb-r all the contents of the notice?

A. I don't know that I remember every word, but I remember the date and the distances of the claim and so on.

Q. Can you decypher any portions of it now?

A. Yes; I did this morning.

158 Q. What proportion of it?

A. Several words.

Q. Half of it?

A. No.

Q. Can you decypher a good many words of it?

A. Yes.

Counsel for the defense objects to the testimony as to the contents of the notice, because if it is at all legible the jury will be the proper parties to determine what it is.

COURT: Take that post and state as much of it as you can from the post what you see there.

Counsel for the defense objects again to the witness stating what the post has written on it; which objection is overruled by the court, and defendant excepts.

A. I cannot read it in this light, except the word "notice."

Def. Q. Can you produce light in the room by which you can read it?

A. I cannot make out anything but the word "notice."

Pros. Q. If you can decypher any of it, do so; if not, say so. Can you make out the name to it?

A. No; I cannot from the writing.

Direct examination continued:

Q. State as near as you can what are the contents of the writing on the post.

Objected to by the counsel for defense as immaterial. Objection overruled by the court; to which ruling defendant excepts.

A. The notice said that he was a citizen of the U. S.

Counsel for the defense objects to the answer as a mere conclusion.

COURT: Are you stating now what was on that notice?

A. Yes.

Objection overruled.

A. That he claimed that mine with the dips, spurs, and angles, and variations; that it was located on the west side of Milo gulch; that it was a half mile north of the forks of Milo creek; that
159 it was two miles and one half from Jackass prairie in a southeasterly direction; that it was two miles from the junction of Milo creek with the south fork of the Cœur d'Alene river; 850 feet ea-terly and 600 feet in a westerly direction and 600 feet wide; called the Stemwinder, in the Yreka mining district, and the name S. R. Devine.

Q. Did it contain any date?

A. 17th of September, 1885.

Q. You say it was signed S. R. Devine?

A. Yes.

Q. Were you acquainted with the handwriting of Devine?

A. Yes.

Q. In whose handwriting was that notice when you read it?

A. In his handwriting.

Q. You know his signature too, do you?

A. Yes.

Q. What have you to say as to whether it was his signature or not?

A. I thought it was his signature.

Q. While you are on the stand I will direct your attention also—(paper shown witness)—look at that, Mr. McAulay, and see if you recognize it.

A. Yes.

Q. Where did that notice come from?

A. It came from the Stemwinder mine.

Q. Do you know when that was posted on the mine?

A. Yes.

Q. When?

A. On the 23rd day of May, 1887.

Q. Do you know who posted it?

A. Yes.

Q. Who did?

A. Do you mean who nailed it to the post?

Q. Yes. State first who nailed it to the post.

A. A gentleman by the name of Milley and John King nailed it to the post.

Q. Where has that notice remained from that day until yesterday up to the time you left Wardner?

A. It remained on the south centre end stake of the claim.

160 Q. Could you find it on the map there, about the locality of it?

A. Yes; exactly right here.

Q. Did I understand you to say that remained continuously from the 23rd of May up to yesterday on the claim?

A. Yes.

Q. Have you examined that this morning to see what the contents were; to see if you could find out the contents of it from the notice?

A. I had it in my hands. I did not try to read it.

Q. See if you can make out the contents of that notice.

At this time counsel for plaintiff offers post in evidence as Exhibit E.

A. I cannot read it.

Q. Do you know what it contained when it was legible, so you could read it?

A. Yes, I did read it when it was legible.

(Notice marked Exhibit 1 for identification.)

Q. Did you ever read that after it was on the claim?

A. Yes.

Q. Did you read it before?

A. Yes.

Q. And compare it with another notice?

A. I compared it with another notice before it was on the claim; before it was posted.

Q. There were no changes in it, were there?

A. No.

Q. It remained just as it was when you compared it?

A. Yes.

Q. Description and all—the entire notice.

A. Well, the entire notice, excepting the witnesses.

Q. I mean that, of course. I will ask you if this is the one you compared with it to see if it was identical or not.

(Another paper, the alleged duplicate, is shown witness.)

A. Yes, this is the one.

Q. I will ask you the question: Now, if the contents of that notice, at the time it was posted, were identical with the contents that you hold in your hand?

A. Yes.

Q. Of your own knowledge?

161 A. Yes; I can tell you how I know that.

Counsel for the defense objects to that as immaterial, and objection is sustained by the court.

Q. (Another paper, the original notice of location hereinafter referred to, was then shown witness.) I will ask you to look at this and see how it compares with what the contents were on the post. (Amended location notice is here marked Exhibit 2 for identification.)

Q. Whose handwriting is that?

A. S. R. Devine.

Q. You have not answered my other question; how it compares with the contents of that notice on the stake, of your own knowledge.

Counsel for the defense objects as a matter for the jury to determine. Objection overruled. Exception taken.

Q. State whether or not this is a substantial copy of the notice you saw on the post.

Counsel for the defense objects as not competent to prove what is on the post. Objection overruled. Defense then asks to cross-examine on this point at this time, but being objected to by the plaintiff the cross-examination was suspended.

Q. Is this a copy or a substantial copy that you read on the post?
A. Yes, so far as the name of the claim, locators, distance, and boundaries, it is an exact copy, and I think it is an exact copy, even word for word; that is my impression.
Q. Whose handwriting?
A. S. R. Devine's.
Q. Whose signature?
A. Devine's.
Q. You recognize his signature?
A. Yes.

Counsel for the plaintiff offers a copy of the notice in evidence, marked Exhibit F, and is as follows:

162 *Notice of Quartz Location.*

That the undersigned, citizens of U. S., claim by right of location and discovery 1,500 ft. on this lead, lode, or vein or mineral deposit, together with all dips, spurs, angles, variations, etc., and 300 feet on each side of the centre of the vein, and all mineral contained in these boundaries, 600 ft. wide and 1,500 ft. long. We claim 850 feet in an easterly, 650 ft. in a westerly, direction from the discovery. Said claim is situated on the west side of Milo creek, about one-half mile north of the forks and about two miles from the junction of Milo creek with the South Fork of the Cœur d'Alene river, about 2½ miles southeasterly from Jackass prairie, Yreka mining dist., Shoshone county, Idaho Ter'y, and is legally marked by stakes and blazes, by three stakes at the east end and three stakes at the west end, and notice at discovery; claim to be known as the Stemwinder.
Located September 17th, 1885.

Locator, S. R. DEVINE.

Witness:
C. E. TYLER.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

I, S. R. Devine, do solemnly swear that I am acquainted with the mining ground described in the location notice herewith, called the Stemwinder ledge, lode, or claim, and that the ground or claim therein described or any part thereof has not, to the best of my knowledge and belief, been heretofore located according to the laws of the United States and this Territory, or, if so located, the same

has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said law.

S. R. DEVINE.

Subscribed and sworn to before me this 21st day of September, 1885.

J. C. COLWELL,
Deputy Mineral Recorder, Yreka District,
Shoshone County, Idaho Territory.

163 Endorsed: 899. Stemwinder lode. Filed for record September 21st, 1885, at three thirty p. m., in the mining recorder's office in Yreka district, Shoshone county, Idaho. J. C. Colwell, deputy recorder. Filed for record in the office of the county recorder Sept. 26th, 1885, at 6 p. m. At the request of J. C. Colwell recorded in Book C of Quartz Locations, page 318. Thos. E. McLelland, county recorder. Exhibit F, plaintiff. Filed September 27th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

Which is then and there read to the jury.

164 Cross-examination:

Q. You say you think that is an exact copy of what is on the post?

A. I think it is.

—. You state he claimed this ledge, with all its dips, spurs, and angles and all its variations; will you examine that notice and see whether it corresponds in that respect?

A. I cannot swear that this notice says with all dips, spurs, angles, and variations and so on. I don't know that all of those words were on it, but what I swear to is this: that as to the name of the claim, the date of it, the name of the locator, and the boundaries, and the objects with which he tied the claim.

Q. Did you ever compare that notice with the post?

A. I didn't; no.

Q. Did you ever read that with the view of comparing them at the time you could decypher it on the post?

A. No.

Q. You are speaking only from your recollection?

A. From my recollection of what was on the post.

COURT: Does that paper say anything about dips, spurs, and angles?

A. Yes.

Q. Did the notice on the post say he claimed it under any particular statute or act of Congress?

A. Well, I don't remember that very clear. What I tried to remember more particular was the number of feet he claimed and the manner in which he tied it. Describe his location with reference to natural objects. The first time I ever looked at it was with the view to see whether his notice was such a notice as the law required,

in my judgment, to hold the claim, and I am not clear as to whether he said anything about the act of Congress under which he took it up. I don't think it did, however.

Counsel for the defense objects to the admission of the paper on the ground that it is not competent and is not connected with the original muniment of title. Objection overruled, and exception taken by defendant.

165 Plaintiff then offers in evidence the obliterated notice of location, which is illegible and cannot be read, the writing of it having been destroyed by the weather, and is offered for the purpose of showing it was the same copy of the amended notice of location to which the witness referred as being illegible and not capable of being read, marked "Plaintiff's Exhibit G."

The amended notice of location, copy of which is referred to by the witness, is then offered, received, and read in evidence by the plaintiff, and is marked H, and is as follows, to wit:

166 *Amended Notice of Location of the Stemwinder Mining Claim.*

Notice is hereby given that the Stemwinder Mining Company, a corporation duly organized and existing under the laws of the State of Oregon, by and through its president, Van B. De Lashmutt, and its secretary, J. C. Moreland, who are duly authorized herein, hereby files this its amended notice of location of the Stemwinder mining claim, for the following reasons and following purposes, to wit: That said mining claim was duly located on the 17th day of September, 1885, by S. R. Devine, who was a citizen of the United States, over the age of 21 years, and notice thereof posted on the claim and recorded in the records of Shoshone county, of Idaho Territory, in vol. C of Quartz Locations, page 318, on the 26th day of September, 1885, to which reference is hereby had and made a part of this amended location and as a basis thereof, and thereafter said locators, by conveyances duly made and recorded, sold the same, and the said company by divers mesne conveyances has become and is now the owner of said mining claim and is in the possession thereof and owns all the right, title, and interest of said locators therein formerly owned and held by them; that since said original location was made the true course, position, and the strike of the vein so originally located, marked out, and defined as the Stemwinder vein or lode has been demonstrated and determined and within the lines as originally staked and located herein, and by survey it has also been demonstrated that said locators staked out on each side of said vein ground in excess of 300 feet on each side of said vein, and the object of this amended notice is to conform to the laws relating to mining claims, both national and local, and to mark and define and record the same to the extent and with the boundaries hereinafter set forth, the same being within the boundaries so located, marked, and staked in the original location hereof and not otherwise; therefore the said The Stemwinder Mining Company, by and through its said officers, duly authorized, hereby give notice that it hereby

locates the vein and lode as discovered originally, by way of amended location, for the purposes aforesaid, and hereby claim the vein
167 within the limits and to the extent as follows, to wit: Beginning at centre of southeasterly end of claim, at a post upon which amended location notice is posted, thence north 69 40 west 356.85 feet to southwest corner, whence a prominent peak bears south 8 22 east, another prominent peak bears north 84 35 east, northwest corner Bunker Hill lode bears north 69 40 west 207.8 feet; thence north 12 28 west 619.6 feet to northwest corner; thence south 69 40 east 713.7 feet to the northeast corner; thence south 12 28 east 619.6 feet to the southeast corner; thence north 69 40 west 356.85 feet to place of beginning, situated about ½ mile southwesterly from town of Wardner, on easterly hillside, in Yreka mining district, county of Shoshone and Territory of Idaho; and that said company intends to hold and work said above-described mining claim as provided by the local laws and customs and the mining laws, both local and national. It is further intended herein not to abandon in any manner or by implication any rights, privileges, property, possession, or title derived or originated, owned or held, under the original location hereof, but that the purpose hereof is to more particularly mark, locate, define, and describe the ground, vein, and premises held by said company without waiving any rights under said original location; all of which the said company claims as the legal successors in interest, and title and possession derived from said original locator.

Original location made September 17th, 1885, & recorded Sep'r 26th, 1885.

Amended location made May 23rd, 1887.

THE STEMWINDER MINING COMPANY,
By VAN B. DE LASHMUTT,
President of said Company.

Attest: J. C. MORELAND,
Secretary of said Company, & Seal Thereof.

[SEAL OF COMPANY.]

168 TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

Van B. De Lashmutt, being first duly sworn, deposes and says—That the Stemwinder Mining Company is a corporation duly organized and existing under the laws of the State of Oregon, and is the owner of the Stemwinder mining claim and in possession thereof and working the same; that affiant is the duly authorized and acting president of said company and makes this affidavit for and on behalf of said company; that affiant is acquainted with the mining ground described in the amended notice of location herewith, called the Stemwinder mining claim, ledge, or lode, and that the ground and claim therein described has not, nor has any part thereof, been heretofore located according to the laws of the United States and of this Territory, and if so located that the same has been abandoned or forfeited by reason of the failure of such former locators to comply

in respect thereto with the requirements of said law; that this notice is simply amendatory of the original location hereof and intended to fully comply with all of said laws, waiving no rights under the original location.

VAN B. DE LASHMUTT.

Subscribed and sworn to before me May 21st, 1887.

M. C. ATHEY,
Notary Public for Shoshone County.

Endorsed: 1131. Amended notice of location of the Stemwinder mining claim. May 23rd, 1887. Stemwinder Co., by Van B. De Lashmutt, president. Yreka district. Recorded at the request of Chas. Hussey June 3rd, 1887, at 11 o'clock a. m., in Book F of Quartz, page 159, records of Shoshone county, Idaho. Thos. E. McLelland, county recorder, by M. J. Sweeney, deputy recorder. Exhibit 2, identification, pl'ff. Exhibit H, pl'ff. Filed in evidence Sept. 27th, 1888. Filed Sept. 27th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

169 VAN B. DE LASHMUTT, a witness on the part of the plaintiff, is then called, sworn, and examined, and testified as follows:

Q. Where do you reside?
A. Portland, Oregon.
Q. What relation do you hold toward the Stemwinder Mining Co.?
A. I am president of it.
Q. How long have you been president of it?
A. Since its organization.
Q. To the present time?
A. Yes.
Q. How many shares of the capital stock of that corporation do you own?

Counsel for the defense objects to the question as immaterial. Objection sustained by the court; to which ruling the plaintiff then and there excepted.

Q. Are you a citizen of the United States?
A. Yes.
Q. Where were you born?
A. Burlington, Iowa.
Q. Do you know the stockholders of that corporati-n?
A. Yes.
Q. Are they citizens of the U. S.?
A. Yes.

Counsel for the defense objects to the question as incompetent and moves to strike the answer of the witness out.

Objection is sustained by the court and the motion to strike out, and the said answer was stricken out; to which ruling of the court plaintiff then and there excepted.

Plaintiff then offers in evidence an affidavit of S. R. Devine as to the citizenship of Devine; which affidavit is received in evidence by the court and read to the jury, and is marked Plaintiff's Exhibit L, and is as follows:

Application to U. S. Surveyor General for Survey of Mining Claim.

S. R. Devine, being duly sworn, says that on the 17th day of September, 1885, he located a certain mining claim, known as the Stemwinder mine, situated on unsurveyed public lands of the
170 United States; that the said locator was at the time of locating the same a citizen of the United States; that said claim was located after the discovery of a vein or lode within the limits thereof; that said claim was distinctly marked upon the ground so that its boundaries can be readily traced, and that the record of said claim contains the name of the locator, the date of location, and such a description thereof as will identify the claim, and that said locator sold under the same to the Stemwinder Mining Co., a corporation organized under the laws of the State of Oregon; which company has amended the location thereof and is now the owner thereof and is now in possession of said mine.

(Signed) S. R. DEVINE.

Subscribed and sworn to before me this 14th day of June, 1887.

[SEAL.] JOHN ATCHISON,
Notary Public.

U. S. surveyor general of Idaho Territory.

SIR: In compliance with the provisions of the Revised Statute- of the United States, chapter 6, title thirty-two, and instructions issued thereunder, we herewith make application for an official survey of the mining claim known as the Stemwinder mine, claimed by the Stemwinder Mining Company, who bought said claim from the original locator thereof, and herewith sends the original and amended notice of location thereof. Said mine is located in the Yreka mining district, in the county of Shoshone and Territory of Idaho, Boisé base and meridian, mentioned and described in the foregoing affidavit and annexed record of location, and we request that you will send to our address and estimate of the amount to be deposited for the work to be done in your office, and after such deposit shall have been made you will cause the said mining claim to be surveyed by F. C. Loring, U. S. deputy mineral surveyor, and will make a plat thereof, endorsed with your approval, designating the number and description of the location and the value of the labor and
171 improvements made by the locator or his grantees on said mining claim, and that you will transmit duplicate copies of said plat to applicant, with a certified copy of the field-notes of survey of said mining claim.

The expenses of said office work are herewith rendered, and request that prompt action be taken therein.

THE STEMWINDER MINING COMPANY,
Claimant,
By VAN B. DE LASHMUTT, *President.*

P. O. address: Ganahl & Hagan, att'ys for said company, Wardner, Idaho.

Endorsed: Application for survey of mining claim. The Stemwinder mine, claimed by the Stemwinder Company. Yreka mining district, Shoshone county. Exhibit L, pl'ff. Filed Sept. 27th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

172 F. C. LORING, a witness for the plaintiff, is recalled, and testified as follows:

Q. On the testimony-in-chief, when you were on the stand before, you testified as to making that survey there for a patent. I will ask you if that is the survey you returned to the surveyor general? (Map shown witness.)

A. It is.

Counsel for the defense objects as immaterial and incompetent.

Plaintiff then offers the map in evidence referred to by the witness, certified to by the surveyor general, together with the certificate of the surveyor general, the plat of the claim described in the amended notice of location as the Stemwinder and marked Plaintiff's Exhibit J, which is herewith inserted.

(Here follows diagram marked p. 172*a*.)

173 JOHN KING is here recalled by the plaintiff, and testified as follows:

Q. When you were on the witness stand on yesterday you testified to seeing a stake at the discovery of the Stemwinder claim, with a notice on it in writing, written on the stake. I will ask you if you have since seen that stake.

A. Yes.

Q. You may examine the stake behind you and identify the stake.

A. That is the stake.

Q. When did you first see the stake on the Stemwinder ground?

Counsel for the defense objects to the question as cumulative. Objection overruled by the court.

Q. When did you first see the stake at the place where you say you saw it upon the Stemwinder claim?

A. 22nd of September, 1885.

Q. Did you read the notice on it at that time?

A. I did.

Q. How long do you know of your own knowledge did that stake

remain? I don't mean the notice written on it, no; there was a paper on it at that time. Do you know the paper notice was on this stake?

A. It was on this stake.

Q. When did you say you first saw the writing written on this stake?

A. Probably a week or ten days afterwards.

Q. Did you read that writing that was written on this stake?

A. Yes.

Q. I will ask you to state whether you can give the contents of that notice as written on the stake.

A. I can give part of it. I cannot give it in full.

Q. Examine it and see what writing you can see on the stake. Examine the writing and see if you can identify it. Did you not examine the stake this morning and the writing on it?

A. Yes.

Q. State whether or not the writing now on there is the same notice or writing you saw on it in September, 1885.

A. Same writing.

Q. Had you read the notice which you saw on the stake on the 22nd day of September, 1885—the notice in writing on paper?

A. Yes.

174 Q. Do you know the contents of it?

A. I know part of it; I cannot give every word of the whole notice.

Q. What difference was there in tha- notice and the notice you saw a few days afterwards written on this stake?

Counsel for the defense objects to the question as attempting to prove the contents of the written notice without accounting for the loss.

Q. State whether or not you remember the substance of the writing you saw on this notice on the 22nd of September, 1885.

A. I remember part of it; yes.

Q. Can you remember the substance of it?

A. Yes.

Q. You may state what difference there was, if any, in that notice and the one you saw a few days afterwards written upon this stake.

Counsel for the defense objects to the question for the same reason as above. Objection was sustained by the court; to which ruling plaintiff then and there excepted.

Q. Did you know the signature of the first notice in writing written on paper?

A. No.

Q. Whose name purported to be signed to it?

Counsel for the defense objects to the question for the same reason. Objection sustained by the court; to which ruling the plaintiff excepted.

Q. Do you know Devine?

A. Yes.
Q. I think you testified he was in British Columbia?
A. The last I heard of him.
Q. How long has he been in that section of the country?

Counsel for the defense objects to the question as cumulative. Objection sustained by the court.

Q. I will ask you whether he is in any organized county or municipality, or in the wilderness.

Counsel for the defense objects to the question as immaterial. Objection overruled.

175 A. He is in a mining district organized like they are in the mountains.
Q. That is, a miners' organization?
A. Yes.
Q. I will ask you if they have a court or notary public there that you know of?
A. None that I know of; there was one officer in the camp quite a ways from the mines.
Q. What kind of an officer?
A. Recorder.
Q. Recorder of mining claims?
A. Yes.
Q. That is all the officer you know of?
A. Yes; that is all I know of.
Q. How far is that section of country from any known settlement in British Columbia?
A. I don't know how far it is from any known settlement in British Columbia.
Q. Do you know of any attempt on the part of Mr. Devine to keep away or avoid giving testimony in this case?

Counsel for the defense objects to the question as immaterial and incompetent. Objection sustained by the court; to which ruling the plaintiff then and there excepted, and the answer was excluded from the jury.

(Plaintiff's counsel stated that there had been no attempt to take Devine's deposition; that Devine's deposition had been taken in another case in this court, was applicable to this case, and defendants would consent that it might be used herein and plaintiff refused to make use thereof.)

Q. What time did I understand you to say this stake remained there with this notice written on it?
A. It was last summer some time, August or September, the last I saw of it.

176 J. L. SMITH was then introduced and sworn as a witness on the part of the plaintiff, and testified as follows:

Q. How long have you known what is generally known as the Stemwinder mining claim?

A. I have known it since the 20th of September, 1885. I probably knew it by hearsay and been over portions of the ground since that time.

Q. Since when?

A. Of my own knowledge, since the 20th of September. I may have been over the ground and heard of it before that time.

Q. Where were you camped on the 17th of September, 1885.

A. Camped on Jackass prairie, about 2½ miles from this claim.

Q. Who was camped with you?

A. John Flaherty, Mike Carlin, and Sandy Devine.

Q. Did you hear any conversation on the night of the 17th, at your cabin, between Devine and the other parties, about the Stemwinder mine and the location of it?

Counsel for the defense objects to the question as immaterial and incompetent. Question withdrawn and witness excused.

177 MICHAEL SWEENEY, a witness on behalf of the plaintiff, was called, sworn, and examined, and testified as follows:

Q. What office do you hold?

A. Deputy auditor and recorder of Shoshone county.

Q. I see you have a book what book is that?

A. Book A, Quartz Locations, Yreka District.

Q. Are you the custodian of it in the office?

A. Yes.

Q. The records of that district?

A. Yes.

Q. Turn to some page in it and find the record of the Stemwinder location.

A. Yes.

Q. Please state to the jury what that is on that page.

A. Page 27.

Q. What number is it?

A. The location is number 24. This is a location of a quartz claim by Mr. Devine, September 18th, 1885, known as the Stemwinder lode.

Counsel for the plaintiff offers to have the record read to the jury; to which the defendant objects as incompetent and immaterial and no proof that it is a substantial copy of any notice proven in court. Objection sustained, as that is the recorded notice, already in evidence as Exhibit F. Notice of location read to the jury by Mr. Sweeney from the book, but is stopped by the judge for explanation.

Q. See if that is the one that is recorded on that page.

A. The endorsement on the back of that does not say that it is the one recorded on page 27.

Q. What page is that recorded on in the district records?

A. I don't know.

Q. That is what I am asking you to find out from your records.

A. I don't know whether this is the same paper or not.

Q. Compare it and see.

(Witness compares paper with record.)

A. Yes; that is an exact copy.

Q. On what page of that book is Exhibit F recorded in the district records?

178 A. Page 27, Book A.

Q. Of what?

A. Quartz locations, Yreka district.

Q. What was the date of the record; is it there?

A. September 21st, 1885.

COURT: It seems to have been recorded in some other place.

A. That is the recorder's office.

Q. Tell where this is recorded in the records of the county.

A. Page 318, Book C, Quartz Locations, records of Shoshone county.

Plaintiff then offered and read in evidence a deed from S. R. Devine, the original locator of the Stemwinder mining claim, to C. E. Tyler and J. P. Smith, by which the grantor conveyed to each of the grantees a third undivided interest respectively in and to the Stemwinder mining claim, which was located on the 17th day of September, 1885, which said deed was dated the 10th day of December, 1885, and duly acknowledged before Thos. E. McLelland, notary public, Shoshone county, Idaho Territory, on said day, and recorded on the same day, in the county recorder's office of said county and Territory, in Book J of Deeds, page 201, marked Plaintiff's Exhibit K.

Plaintiff then offered in evidence a deed bearing date of March 7th, 1887, from James P. Smith, S. R. Devine, and Charles E. Tyler to Van B. De Lashmutt, marked Exhibit L; which deed conveyed to the grantee all and singular the Stemwinder mining claim as described in the original notes of location thereof—1,500 feet in length and 600 feet in width, with surface ground, and lying west of the Bunker Hill mine of Wardner, and referring to the original notice of location for a more particular description; which said deed is of record in the records of the recorder's office of Shoshone county, Idaho Territory, in Book L of Deeds, page 571, and recorded on the 10th day of March, 1887, which said deed is acknowledged before Isaac S. Daly, notary public for Idaho Territory, by all the grantors on the 7th day of March, 1887.

Plaintiff then offered in evidence a deed from Van B. De Lashmutt to the Stemwinder Mining Company, plaintiff, marked Exhibit M herein, conveying to the Stemwinder Mining Company all of the Stemwinder mining claim; which said deed was duly ac-

179 knowledged on the 14th day of March, 1887, before Eugene D. White, commissioner of deeds for the Territory of Idaho, residing at the city of Portland, in Oregon, and recorded in the county recorder's office of Shoshone county on the 19th day of March, 1887, at 6 o'clock p. m.

Both of which deeds were read in evidence to the jury.

180 ALBERT HAGAN, a witness on the part of the plaintiff, was then called, sworn, and examined, and testified as follows:

Q. Where do you reside?
A. I reside, at present, in Wardner.
Q. You are an attorney-at-law, are you?
A. Yes.
Q. What relation do you bear, if any, to the Stemwinder Mining Company?
A. I have been the attorney for it since its first inception—organization.
Q. Is that the time you first became acquainted with the Stemwinder mine?
A. Yes.
Q. I will ask you who, if any one, has charge of the legal affairs of the company?
A. I have; not only the Stemwinder but its grantors, for that matter.
Q. You have had charge of the affairs of the Stemwinder Mining Company and its grantors?
A. Except Devine. I was not attorney for Devine.
Q. Did you hear the testimony of King and some of the other witnesses on the stand, in this case, with reference to the notice which was originally posted on the Stemwinder claim?
A. Yes.
Q. You may state what efforts, if any, in behalf of the Stemwinder Mining Company you made to find that notice.
A. I made inquiries of the locator as to not only that notice but other notices that he put up, when he put them up, and where they were.
Q. What business was you engaged in at that time with reference to the muniments of title of this mine?
A. I was hunting them up and examining them. It was my only object in going to Devine.
Q. You say you went to Mr. Devine for that?
A. Yes; went to him on several occasions.
Q. State what, if anything, he did in your presence in the effort to find that notice.

181 A. I went to him at Spokane Falls and he took me to his room and declared he did not have——

Counsel for the defense objects to what Devine said in the matter.

Q. State what Mr. Devine did in your presence.
A. I went with him to his papers.
Q. Describe what he had in the way of papers.
A. It was what I supposed were his papers. I went to the box of papers he pointed out, he and myself both went through them, and I found two papers that pertained to the Stemwinder Company. I took them from him with his consent, one of which has been offered in evidence already.
Q. You may state about how large a package of papers he had.

A. They were in a box—thrown in loosely. There were papers there relating to the Bunker Hill and Sullivan and other mines.

Q. What was the appearance of that box of papers, as to being a box of his papers or a man's papers that he usually keeps.

A. They were all relating to mines in Yreka mining district, except some deeds relating to matters I didn't know anything about.

Q. What search, if any, did you or he, either one, make through those papers?

A. Both of us went through the papers. I was examining them, as I tell you, to find something relating to the Stemwinder. I found two papers, and that is all that there was among his papers, and he had no other papers that I know of.

Q. Tell how diligently Devine searched those papers for this notice that had been originally posted.

A. I don't know that he diligently searched for that notice any more than any notice relating to the Stemwinder mine. He hunted and went through paper by paper and called them off, and I told him I did not want them—something that did not relate to my business, and I told him I did not want them—and finally he came to two in which I was interested, and he went through his papers and I went through his papers myself.

Q. Did you or him find that notice that was originally posted on the claim?

182 A. No; there was no such notice there.

Q. Have you made any other search to find that paper?

A. I made inquiries from him to know what became of it.

Q. What answer did you get to those inquiries?

Counsel for the defense objects to the question as incompetent. Objection sustained.

Q. Did you ascertain where it was?

A. I asked him where I would be likely to find it.

Counsel for the defense objects to the further answer of the witness as incompetent; which objection is sustained.

Q. What reply did he make to that question?

Counsel for the defense objects to the question as incompetent. Objection sustained.

COURT: You did not find the paper you were looking for?

A. No; he did not have it.

Q. Did you make any other search for it anywhere else, or inquire?

A. No; I inquired of my company and looked through what papers I had for the company.

Q. Who has charge of the papers for the company?

A. I have.

Q. Have you ever had that notice, or seen it?

A. No; I have looked for it; never inquired of anybody I met or anything of that kind, but I have looked for it where I ought to find it if it is in existence, or where I could find it.

Q. I will ask you this question, whether or not Devine had permanently removed from Wardner at that time to Spokane Falls.

A. He was in business there at that time, so he said.

Q. Spokane Falls?

A. Yes.

Q. Did he any longer have a residence in Wardner or this Territory?

A. Not that I know of. He claimed that he did not have when I wanted to take his deposition.

183 Cross-examination:

Q. What time did you first go to Wardner?

A. I first went to Wardner about January 1st, 1887.

Q. When did you first become acquainted with the claim of the Stemwinder in a legal capacity?

A. At the very first inception of their purchase of the property. I was the attorney of the parties before they bought the Stemwinder, in all their business.

Q. I understood you to say you were the attorney for the grantors of the Stemwinder Company?

A. All except Devine, I said.

Q. When did you assume that relation of attorney for the other owners?

A. You mean as special or general attorney?

Q. Attorney for the other grantors of the Stemwinder Company.

A. I have been attorney for McAulay for years when I have been in access to him, and Mr. De Lashmutt, whose interests were represented by McAulay, at the very first inception; I don't remember the date.

Q. Sometime after January, however?

A. Yes.

Q. You have been upon the Stemwinder property?

A. Yes.

Q. When did you first visit the claim?

A. I never went there until—I don't remember. I went there with Mr. *Be* Lashmutt and Mr. McAulay.

Counsel for the plaintiff objects to the question as not responsive to direct examination.

A. It was somewhere among the spring months; I don't remember the month; never taxed my memory with it. I don't think it was in January or February or March.

Q. Some time in the early season of 1887?

A. Yes.

Q. You were then attorney for some of the parties interested in the Stemwinder, were you, when you first visited it?

A. Yes.

Q. When did you have this interview with Devine at Spokane Falls?

184 A. That was in the summer. I had several conversations

with him here when he came up to give his deposition in the Tyler case.

Q. In regard to this going through the papers that you found in his box at Spokane, that was in the summer of 1887?

A. Yes; might have been in the fall; I think it was, too; I think it was last fall; I know it was. I know it was weather that was cold, because there was a fire in the house.

Q. Had you, prior to that time, made any search for this location notice?

A. No; I had made inquiries.

Q. You had made casual inquiries?

A. Casual inquiries only.

Q. You had made no search before that time?

A. No; I knew it was of no use to make any search—that is, I acknowledged it was of no use to make any search.

Q. Did you at any time represent Mr. Tyler or J. P. Smith in their business connections?

A. No; they are comparative strangers to me.

Q. Did you ever make inquiry of Tyler or Smith in regard to this notice?

A. I never saw them since the date they went to Cœur d'Alene to make the deed. I don't think they have been in the country that I know of.

Q. They were two of the grantors of this property, were they not?

A. Yes; they were intermediate grantors—grantees of Mr. Devine.

Q. And joined in the conveyance to the present owners by which the present owners claim their title?

A. Yes; they all three owned an interest when they made the deed.

185 JOHN KING, recalled as a witness on the part of the plaintiff, testified as follows:

Q. You testified on yesterday that when you first went upon the Stemwinder mine you saw a notice in writing on a piece of paper posted at the discovery, and that a few days afterward you saw a notice that was written on this stake, written on the wood with pencil, and that the written notice on paper was gone. I will ask you if you examined the contents of that notice written on paper.

A. Yes; I read the notice.

Q. I will ask you if you read it with any care, or with what care you read it.

A. I read it with care to see how they claimed the ground and how much.

Q. Are you able to state the contents of that notice?

A. I can state part of it.

Q. Can you state the substance of it?

A. Yes.

Q. You may state what was in that notice, as near as you can.

Counsel for the defense objects to the question for the reason that

the foundation has not been laid for the introduction of oral testimony as to the contents of this paper. Objection overruled.

Q. State the contents of that notice that you saw there on the 22nd of September, 1885.

A. The location of the Stemwinder. On the west side of Milo gulch, 1,500 feet in length and 600 feet in width and half a mile north of the forks of Milo creek, about 2½ miles south from Jackass prairie. S. R. Devine, locator of the Stemwinder mine.

Q. What date was attached to it?

A. 17th of September, 1885.

Q. Now, you have stated that a few days afterwards, when you were on that ground, you saw another notice—this notice written on this stake on the wood?

A. Yes.

Q. Did you examine that notice at that time?

A. Yes.

Q. Did you examine it, if at all, with reference to its con-
186 tents as regards the notice that you had seen there before on the 22nd?

A. I did.

Q. Are you able to state the comparison between the two notices or the similarity, if any?

A. They were just about the same, as near as I understood it.

Q. Did you have any reason, when you saw this notice written on the stake, to examine it to see whether or not it was the same as the notice that you had before seen?

A. Yes; I had good reason to notice it.

Q. What was that reason?

Counsel for the defense objects to the question as immaterial. Objection sustained by the court.

Q. (Paper shown witness.) You may examine this notice marked Exhibit F, plaintiff.

A. The contents are about the same as the first one I saw; of course there may be some words different, but the distance and amount claimed is about the same; same signature.

Q. How is it with reference to the description of the place where the claim is situated?

A. The description is just the same.

Q. How frequently were you on this Stemwinder mining claim in 1886?

A. I was there a number of times in 1886.

Q. About how often?

A. Often as 100 times or more.

Q. Did you have occasion to note and see the work that was done there by the Stemwinder people, on that claim, during that year?

A. Yes.

Q. How long have you had experience in the business of mining?

A. 14 or 15 years.

Q. Do you know the value of work upon mining claims?

A. Yes.

Q. What was the character of this work that was being done there in 1886?

A. Running tunnels.

Q. Developing the claim?

A. Yes.

187 Q. State whether or not it was done within the boundaries of the claim.

A. It was.

Q. What was the value of the work done there by these parties in 1886?

A. I cannot tell that because I did not pay enough attention to know the value.

Q. What would be a fair value, at least a fair value, of the work done?

A. Probably $1,500 worth or more.

Q. You think there would be at least $1,500 worth?

Motion to withdraw the case from the jury, etc., read by counsel for defense and filed. Motion overruled by the court.

188 VAN B. DE LASHMUTT, a witness on the part of the plaintiff, is recalled, and testified as follows:

Q. This has been offered in evidence, the certificate of the articles of incorporatiom of the Stemwinder Mining Company, of which you purport to be president. (Paper shown witness.)

A. I will state, in connection with this, that corporations are not allowed to incorporate until they shall certify in their corporation that they have filed with the secretary of the State, and also with the county clerk, a copy of the articles of incorporation.

Counsel for the defense objects to what the laws are being stated by this witness.

A. I will state that I filed with the secretary of state and with the county clerk duplicate copies of the articles of incorporation and kept a copy with the company, and also certified to that under oath.

Q. Are those copies of the original you filed?

A. Yes; both with the secretary of state and with the county clerk, and we also kept a copy, which is filed with the papers of the company, and we certified to it when we finally organized the company; we were not allowed to organize until we did do it.

Q. From that date state whether or not you have been acting as a corporation.

A. Ever since.

Q. And are now acting?

A. Yes.

Q. Doing business in Idaho Territory?

A. Yes.

Q. Where?

A. At Wardner.

Q. What in, mining?
A. In mining; yes.

189 Cross-examination:

Q. You say you are doing business in Idaho?
A. Yes.
Q. Have you ever filed a copy of the articles with the secretary of this Territory?
A. Yes; we have.
Q. When did you do it?
A. We did it—I don't remember just when; but I know they have been filed.
Q. Who is he?
A. I cannot remember his name now, but I know the articles have been filed with the secretary of this Territory.
Q. The Territory of Idaho?
A. Yes.
Q. When?
A. I don't remember the date; it has been over a year, I think.
Q. You are positively sure they are filed?
A. Yes.
Q. Ever get a certificate of it?
A. Yes.
Q. Where is it?
A. It is filed with the secretary of the company.
Q. Filed with the secretary of the company. Had they first been filed in this county with the recorder?
A. I won't state as to that. I think, however, they were. I know we had to appoint a resident attorney; we did that; and we filed our papers with the secretary of the Territory, and I think we did with the county recorder, but I won't say positive about that.
Q. Do you remember when you filed it with the county?

Counsel for the plaintiff objects to the examination and question, as not being required to file the paper with the county.

Whereupon the plaintiff, having no further testimony, rests his case.

190 Defendant then offers a certified copy of the articles of incorporation, certified to by the secretary of the State of Oregon, and also a certified copy of the articles of incorporation as filed with the clerk of the county court of Multnomah county, Oregon, and marked Exhibits A and B, defendant; which articles were received and read in evidence.

CHARLES SWEENEY, a witness on the part of the defendant, is then called, sworn, and examined, and testified as follows:

Q. State if you know the Emma & Last Chance Mining Company.
A. Yes.
Q. State whether or not they are doing business in this Territory.
A. Yes.

Q. Where?
A. Wardner, Shoshone county, Idaho Territory.
Q. What position do you occupy with reference to it?
A. Just interested in it; that is all.
Q. State whether or not you are a stockholder.
A. Yes.
Q. Do you know whether they claim to act as a corporation in this Territory or not?
A. Yes.
Q. In this county?
A. Yes.

Plaintiff makes a formal objection at this time to the introduction of the articles of incorporation on the ground that they are incompetent and immaterial. Objection overruled.

191 GEORGE R. TRASK, a witness on the part of the defendant, is then called, sworn, and examined, and testified as follows:

Q. Do you know the Emma Lode mining claim in Yreka mining district, Shoshone county?
A. I do.
Q. State if at any time you made a survey of it.
A. I did. In December, 1886, I made an official survey of it.
Q. State what you found upon the ground to indicate the boundaries of that claim.

Objected to by plaintiff. Objection overruled.

A. I found trees and stakes there pointed out to me as being the boundaries.
Q. Did you find any marks upon them indicating they were boundaries?
A. Yes.
Q. Taking some initial point, state what you found in detail. Where did you begin your survey, in the first place?
A. At the southeast corner——
Q. What did you find there?
A.—of the claim I found a dead pine tree blazed and marked the southeast corner of the Emma Lode claim.
Q. Describe the character of the marks. Were they old or new?
A. Old marks. At the east centre end I found a burned pine tree marked east centre end of the Emma Lode claim. At the northeast corner I found (refers to book)——
Pros. Q. What are you reading from?
A. From notes taken on the ground at the time—burned pine tree about 14 inches in diameter, marked northeast corner of the Emma lode.
Q. State the character of these marks, as to whether they were recent marks or old marks.
A. They were old marks. At the southwest corner there was a pine tree about 10 inches in diameter and marked the southwest corner of the Emma Lode. At the west centre end there was a large

live pine tree about 16 inches in diameter and marked the west centre end of the Emma Lode.

Q. State if it was blazed.

192 A. It was blazed. At the northwest corner there was a post lying down, with no marks upon it except the Emma lode.

Q. State if there was any evidence that it had ever been standing.

A. Yes.

Q. Describe what they were.

A. There was a place there in the ground that was evidently been where it had fallen out of, probably; there was a hole in the ground where the post had stood, but it was nearly filled up—partially filled up. It seemed to me the post had been standing there.

Counsel for the plaintiff objects to the answer of the witness, and counsel for the defense consents to the impression stated by the witness to be stricken out.

Q. That was all the marks that was on the post?

A. Yes.

Q. State the appearance of the post, as to the age and the marks on it.

A. It was quite an old post; been there for some time.

Q. Describe it as to size.

A. It was about five inches square.

Q. As to length?

A. About six feet long.

Q. You say you were making an official survey for a patent?

A. Yes.

Q. Who were present while you were making that survey upon the ground?

A. John Flaherty, Bryan Flaherty, Charles R. Long, Dave Wiseman, Sandy Devine, and a man by the name of Smith, who was interested in the Stemwinder claim, and one other party who was interested in the Stemwinder claim, whose name I don't remember.

Q. Was Mr. Tyler there?

A. Mr. Tyler; yes.

Q. They were all present?

A. Yes.

Q. Have you made a map from the survey you have just described?

A. Yes.

Q. Just point it out, the lines and corners you have described up to this time?

193 A. This is the original southeast corner of the claim; this is the east centre; this is the northeast corner; this is the northwest corner; this is the west centre, and this the southwest corner.

Q. What does the dotted line represent?

A. It represents a line drawn from one corner to another. The south line from the southwest to the southeast, the north line from the northwest to the northeast, and on the west end from the north

to the west centre and from the west centre to the south, and on the east end from the original northeast to the east centre and then to the southeast.

Q. Have you made a map of the claim as you surveyed it for a patent?

A. Yes.

Q. Point it out.

A. This part in blue is the part that was surveyed for patent, extending out here from corner 1 to 2, 2 to 3, corner 3 to 4, and from 4 back to 1.

Q. You may state where corner 1 is with reference to the original southeast corner.

A. Corner number 1 is about 380 feet northwesterly from the original southeast corner.

Q. Where is corner number 2 with reference to the original southwest corner?

A. That is 280 feet northeasterly from the original southwest corner.

Q. Why did you select that particular place as the southwest corner of the official survey for patent?

Counsel for the plaintiff objects to why he did it, the reasons for doing it being immaterial and incompetent. Objection overruled; to which ruling of the court the plaintiff excepts.

Q. Why did you select that particular place as the southwest corner of the official survey for a patent?

A. John Flaherty and the members of the Stemwinder lode that I have mentioned told me——

Counsel for the plaintiff objects to what they told him, upon the ground that they must show some right to the Emma claim;
194 that it is incompetent to prove title to a mining claim by parole or declarations of parties, and that it is in advance of any proof that there was any valid location of any claim, and that parole testimony was not admissable to show the disputed boundary of a mining claim or to vest title or to divest it. The objections were overruled by the court; to which plaintiff then and there excepted.

A. Do I understand that I can begin by stating the conversation I had with these parties.

COURT: Who pointed it out to you? Why did you go there to do that?

A. Sandy Devine and Mr. Smith.

Q. What Smith?

A. One of the owners; I don't know his first name, but one of the owners in the Stemwinder——

COURT: Just confine yourself and state who pointed it out to you.

A. I am trying to think of the other man's name. Mr. Tyler and John Flaherty took me to the point of rocks—a small pile of rocks upon the hillside—telling me——

Counsel for the plaintiff objects to what they told him.

A.—and pointed out this pile of rocks. Shall I say what this pile of rocks was—what they explained to me?

Q. Yes.

Counsel for plaintiff objects to the witness stating any conversations; which objection was sustained by the court.

A. I am trying to explain this point of rocks as pointed out to me as a line.

COURT: By those gentlemen you mentioned?

A. By those men and Mr. Flaherty, as a line that was measured by them.

Counsel for the plaintiff objects as incompetent. Objection sustained by the court.

DEF.: Point that place on the map if you have marked it.

A. This point marked compromise stake—this black dot at the south line of the Emma lode as surveyed for a patent.

Q. At that time had any official survey been made of the Stemwinder lode claim?

195 A. No.

Q. You say you surveyed that portion of ground indicated by the blue ground for a patent?

A. Yes.

Q. By virtue of what authority did you survey it?

A. By orders from the surveyor general to make an——

Pros. Q. Are those orders in writing?

A. Yes.

Counsel for the plaintiff calls for the writing, and the question is withdrawn.

Q. Who assisted you in making this survey, if any one?

A. Charles House and Dave Wiseman were my assistants and Byron Flaherty,

Q. What is indicated by the irregular line on the right-hand side of the map nearest the border—the double line?

A. This parallel line?

Q. Yes.

A. That is the wagon road from the town of Wardner to the Bunker Hill and Sullivan concentrator.

Q. What is indicated by the next irregular parallel line?

A. That is Milo creek.

Q. Which is the north of that map?

A. The top part.

Q. Did you survey the boundaries of the Stemwinder lode claim?

A. Yes.

Q. Have you indicated that upon the map?

A. Yes.

Q. State how it is indicated.

A. By the heavy black lines bounding the yellow ground.

Pros. Q. And marked Stemwinder?

A. And marked Stemwinder lode.

Q. What boundaries are those you have indicated by that plat?
A. Those are the boundaries of the Stemwinder lode as now surveyed for patent.
Q. Have you represented the relative positions of these claims as surveyed for patents respectively on that map?
A. Yes.
196 Q. You have marked the point of discovery within the ground in conflict?
A. Yes.
Q. Will you describe what is there from which you made that survey?
A. There was a cut 10 feet long, 4 feet wide, and about 3½ feet deep at that point.
Q. State what evidence there was, if any, of mineral at that point.
A. There was galena.
Q. State how it was with reference to the formation.
A. There was galena in solid formation running through it.
Q. State if there was any evidences of a notice there.
A. There was a notice in a box upon a tree just west of the discovery, about 10 feet from it, describing it as the location——

Counsel for the plaintiff objects.

Q. Did you read it?
A. Yes.
Q. Do you know the contents of it?
A. Yes.
Q. Does that map correctly represent the surveys you have described and the position of the objects you have testified with reference to?
A. Yes.

Counsel for defense then offers the map in evidence, marked Exhibit C, defendant.

197 Cross-examination:

Q. Do you say that represents the survey of the Emma lode you made for a patent?
A. Yes.
Q. And the survey is correct?
A. Yes.
Q. You have testified to the original, or what you said were the original, stakes you found on that claim?
A. Yes.
Q. Will you please point out to the jury the north line of that claim as originally staked, according to what you found?
A. This is the north line here.
Q. That dotted line?
A. Dotted, broken line.
Q. Have you ever measured it?
A. Yes; indirectly.
Q. What do you mean by indirectly?

A. We don't have to go over the exact line.

Q. I did not ask you if you had to; I asked you if you ever measured it.

A. No; I did not measure that line all the way through.

Q. Can you tell how long it is from one corner to the other, there?

A. Yes.

Q. Please tell.

A. About 2,340 feet.

Q. While you are there, please measure the south line from the southeast corner to the southwest corner?

A. About 1,965 feet.

Q. Where are the east end stakes you say you found, with reference to Milo creek?

A. The southeast corner stake is about 10 feet from the creek, easterly from it, and about 20 feet westerly from the wagon road. The east centre was right on the west side of the wagon road, about 15 or 25 feet from the creek, easterly from it. The northeast corner stake was about 15 feet easterly from the creek.

198 Q. On which side of the creek were all these stakes?

A. All on the east side of the creek.

Q. As briefly as possible, tell me what the southeast corner was?

A. The southeast corner was a burned pine tree about 14 inches in diameter, blazed on two sides and marked the southeast corner of the Emma lode. The east centre was a burned pine tree about 12 or 14 inches in diameter, blazed and marked the east centre of the Emma lode. The northeast corner was a burned pine tree, blazed and marked the northeast corner of the Emma lode. On the west centre was a large live pine tree about 18 or 20 inches in diameter; it was blazed on the east side and marked the west centre of the Emma lode. At the southwest corner there was a small pine tree, dead, about 12 inches in diameter, blazed and marked the southwest corner of the Emma lode. At the northwest corner there was a stake about 6 feet long and about 5 inches square and marked the Emma lode.

Q. I wish you would tell me now at this corner here, which is the southwest corner, if you saw any other stakes adjacent there.

A. No; I did not.

Q. Saw no stake?

A. No.

Q. Did you see the Stemwinder stake anywhere here?

A. I did not look around very much for any other stake; I did not see any other, and I did not look for any other.

Q. Did you look for any other?

A. No.

Q. Did you see any other stake at this west centre end but the one marked Emma?

A. No; there was no other stake there.

Q. Did you see any here at the northwest corner marked in any other way except the Emma?

A. No.

Q. Did you look at either of these points for stakes?
A. No; I didn't — very much for them at the northwest corner; I look- quite a little but saw no other stake there.
Q. You don't mean quite a little, you mean quite much?
199 A. I mean I looked a little.
Q. Did you see any west end stakes of the Stemwinder at that time?
A. No; I didn't look for them.
Q. Did you see any stakes at the southeast corner of the Emma—any stake of the Stemwinder near there?
A. There was another tree there, close by that was blazed, but I don't think there was any marks upon it.
Q. It was a tree, was it?
A. Yes.
Q. Blazed?
A. Yes.
Q. I asked you if you saw any Stemwinder stakes near there.
A. I don't know what that was.
Q. You don't know what the stake was you saw, and you saw none there?
A. No.
Q. That map shows the proper location of the Emma discovery as pointed out to you?
A. Yes.
Q. You spoke of seeing a paper posted near that point?
A. Yes.
Q. How far from that point did you find any galena ore?
A. I found galena ore right at the point of discovery.
Q. No, that notice I speak of.
A. About 15 feet from it—from the notice.
Q. In a hole?
A. Yes.
Q. Did you find any galena ore lying in a shaft or on the side?
A. In a cut in the rock in place.
Q. Are you positive of that?
A. Yes.
Q. That you examined the cut?
A. Yes.
Q. At that point indicated on the map?
A. Yes.
Q. And you found galena there in place?
A. Yes.
200 Q. 15 feet from that notice?
A. I say it was about 10 or 15 feet.
Q. I don't care about that. I am not asking you about that, because it could be 10 or 20 feet.
A. Yes; it was about 15 feet.
Q. It is the nearest hole to the notice you saw or the paper you saw. I don't say what it is?
A. No; I think there was another little digging there, a small

hole that was close by this, about the same disrance from the discovery.

Q. About 15 feet?

A. About 15 feet. There was a little digging there.

Q. I am asking you about this paper you saw. I am not asking you the contents. I am only giving it as a point for starting. You say this point you have marked discovery was about 15 feet from that?

A. Yes.

Q. Was there any other point there, where they were digging, any closer to the paper you saw?

A. I don't remember whether there was or not.

Q. Was there any other galena then any closer than that?

A. No; I don't think there was.

Q. You examined for that point, did you?

A. Yes. It is my impression, as I say, there was another small cut or digging near this point marked discovery.

Q. Please tell the jury how far it is from that point marked discovery to the west end of the survey you mad[illegible] day.

A. About 273 or '4 feet.

Q. To the west end of the Emma as surveyed?

A. Yes; to corner 2.

Q. Will you please tell the jury how far it is from the same point to corner 1 of the same survey?

A. About 1,215 feet.

Q. Then the survey you made was 1,215 feet upon one side and 272 upon the other of the discovery.

A. That is measuring from the discovery to corner number 2 and number 1 in a straight line from the discovery.

Q. No; I understand that. My question indicates that.

201 Redirect examination:

Q. Mr. Trask, did you have a copy of the location notice of the Emma lode claim with you when you made that survey?

Counsel for the plaintiff objects because it speaks for itself, and defense cannot introduce location notice that way.

COURT: Just ask him if he had what purported to be a copy of the location notice with him.

Q. Did you have what purported to be a certified copy of the location notice of the Emma survey with you?

A. Yes.

Q. What is the nature of the surface ground upon which the claim is located of which you made a survey, as to being smooth or otherwise, steep or level?

A. East of the discovery it is very steep, with some brush, and rocky, and west of it it is very rocky, precipitous, perpendicular bluff a short distance west of it, on the south line.

Recross-examination:

Q. When you speak of brush you mean the slope toward the town of Wardner?
A. Yes.
Q. Much brush there?
A. Yes.
Q. Enough to obscure a man?
A. There was some brush along the south line, not much.
Q. Can't you stand at the town of Wardner and see the point marked discovery very plainly?
A. I don't know whether you can see it at the town of Wardner. I think the hill hides it. I think you could see it from the road.
Q. From the road, then, that comes up from the town of Wardner?
A. Yes.

202 MICHAEL CARLIN, a witness on the part of the defendant, being duly called, sworn, and examined, testified as follows:

Q. Are you acquainted with the mining claim in the Yreka mining district known as the Emma claim?
A. I am.
Q. State whether you are one of the locators of that claim.
A. I am.
Q. When did you first go upon the ground?
A. I first went upon the ground the 17th of September.
Q. Of what month?
A. Of September.
Q. Of what year?
A. 1885.
Q. Just state it over again; when did you first go upon the ground.
A. I said the 17th of September.
Q. 1885?
A. Yes.
Q. State whether or not you made any discovery of a ledge of mineral at that time.
A. I did.
Q. Describe it.
A. We found galena.
Q. In what position?
A. We found it in rock.
Q. State whether not it was in place.
A. It was.
Q. What did you do when you discovered the mineral?
A. We put a notice on it.
Q. You say we. Who was with you?
A. John Flaherty.
Q. Any one else?
A. No.
Q. You saw the notice placed upon it?
A. I did.

Q. At what point with reference to the discovery?
A. Right at the discovery.
203 Q. Q. What did you place the notice upon?
A. Posted it on a tree or snag—tree that had been broke off.
Q. What was it a notice of?

Counsel for the plaintiff objects, as the notice will speak for itself.

Q. When did you last see that notice?
A. Saw it in the spring of 1886.
Q. What was its condition at that time?
A. Well, the centre was blowing out of it. It was in kind of ribbons like.
Q. You saw the centre?
A. Yes.
Q. Was that the portion upon which the writing was?
A. Yes; the centre of the notice.
Q. Could it be read at that time?
A. No.
Q. What became of it finally?
A. Blowed away; rain wore it out.
Q. You say the wind blew it away?
A. Yes; wind and rain. I was there nearly every day.
Q. State whether or not it is in existence now.
A. It is not.
Q. State what that was, that notice; what it had been put there for.
A. It had been put there for the location notice.
Q. Of what?
A. Of the Emma.

Counsel for the plaintiff objects to the contents of the notice being stated. Cross-examines witness on this point.

Q. What did you say that paper was?
A. A notice.
Q. Notice of what?
A. Of the Emma location.
Q. Did you ever read it?
A. No.
Q. Never read it?
A. No.
Q. Then you don't know, from your own knowledge, what
204 the writing contained?
A. No; not from my own knowledge.

Counsel for the plaintiff at this point does not think the witness is competent to tell the contents of the notice.

Q. Did you ever read it, from your own knowledge?
A. I did not.
Q. Then you don't know from your own knowledge what it con-contained?

A. I do not.

Counsel for the plaintiff objects to the witness testifying to the contents of the notice. Objection sustained by the court.

Direct examination continued:

Q. Describe the paper on which it was written—the size of it and so on.

A. It was a piece of paper something about the size of this.

Q. Ordinary note paper or letter paper?

A. Yes.

Q. Who posted the notice on the post—who did the actual posting—on the 17th of September? Who was it put this paper up you testified to?

A. I think I tacked it up.

Q. You think you tacked it up?

A. Yes.

Q. What did you put it up there for?

Counsel for the plaintiff objects to the question as incompetent and immaterial.

Q. What was your object in nailing it up?

Counsel for the plaintiff objects to the question as incompetent and immaterial.

A. For a notice.

Q. Notice of what?

A. Notice of location.

Q. Of what?

A. Of the Emma.

Counsel for the plaintiff objects to this testimony of the witness. Objection overruled.

205 Q. You nailed this up on a tree?

A. Yes.

Q. On the 17th of September?

A. I tacked it up with wooden pegs.

Q. Who was with you at that time?

A. John Flaherty.

Q. Did you see Mr. Devine on the 17th of September?

A. I did.

Q. Where was he at this time?

A. I left him about 6 or 800 feet up there on the top of the mountain.

Q. Did you see him at that time?

A. No; I did not.

Q. Did you see what he was doing?

A. Going toward Deadwood gulch.

Q. Going toward Deadwood gulch?

A. That is where he told me he was going.

Q. State where he had been up to the time he had started over the mountains.

A. Where he had been?
Q. Yes; whether he had been with you or not?
A. He had.
Q. From what time?
A. From about, I should judge—maybe 5 or 6 o'clock in the morning.
Q. Where were you together at that time in the morning?
A. We were moving camp.
Q. Where from?
A. From about a half a mile below Elk creek to Tom Erwin's ranch.
Q. You say Devine was with you at 5 o'clock in the morning of the 17th?
A. About 5 o'clock.
Q. On the 17th?
A. On the 17th.
Q. Do you know where he had been on the 16th?
A. Yes.
Q. Where had he been?
A. He had been up to Evolution.
Q. Do you know whether or not he had been in Milo gulch on the 16th?
206 A. He had not been.
Q. You say he was with you continuously from the time you started out in the morning at 5 or 6 o'clock until the time you tacked this notice up on the tree.
A. No; I left him about 800 feet before I found the galena.
Q. You had been together continuously up to this period when you left him to go down and put up this notice?
A. No; we went down and found the galena.
A. Yes, sir; understand me now. That notice you are speaking of now was a small notice. I mean the big piece of paper I tacked up.
Q. You are referring now to the first notice that was tacked up on the tree?
A. I am referring to that now.
Q. That was the one you tacked up?
A. No; I did not tack up the first.
Q. That was tacked up?
A. It was tacked up.
Q. After Devine started over the mountains?
A. Yes.
Q. Before parting with Devine what had you been doing while together.
A. We had been coming from the ranch, on that side of the mountain.
Q. Had you just arrived on the mountain?
A. No; we had been traveling on the mountain up from the river.
Q. Had you or Devine made any locations since coming up?
A. No.

Q. Had you posted any notices?
A. No.
Q. Was he in sight from the time you saw him going over the mountain?
A. No.
Q. He was out of sight?
A. He was.
Q. Do you know what he was doing?
A. I do not.
Q. What direction was he from where you were?
A. He was west of us.
207 Q. Directly west?
A. Right direct west.
Q. You left him at a point about 800 feet west from where you put this notice?
A. Yes; about 800 feet.
Q. That was upmon the mountain?
A. Right upon the mountain.
Q. You have spoken about notices. Will you state what notice you refer to as the little notice?
A. That is the one we put up that day that me and Flaherty were coming down.
Q. That was the one you put up when Devine was going over the mountain?
A. Flaherty put it up.
Q. Were you present?
A. I was.
Q. Did you see it written?
A. I was sitting down there.
Q. Did you read it?
A. No.
Q. Did you have any conversation about it?
A. No.
Q. What did he do with it after he had written it?
A. Nailed it on the tree.
Q. Did you read it?
A. I did not.
Q. What size was it?
A. It was out of an account book, pocket account book.
Q. How much of a page did it cover—most of it?
A. Perhaps maybe that long.
Q. Did he read it aloud to you?
A. No; I couldn't say he did.
Q. Do you remember whether he did or not?

Counsel for the plaintiff objects to the question on the ground that it is hearsay if he did and immaterial. Objection overruled.

A. He spoke to me about the direction.

Counsel for the plaintiff objects to the answer.

208 COURT: Did he read it aloud?

A. No; he did not read it aloud.
Q. After he had written on this piece of paper what did he do with it?
A. Put it on the tree.
Q. In your presence?
A. Yes.
Q. Was this near the point of discovery you mentioned?
A. Yes.
A. On the same tree the other notice was put on?
A. Yes.
Q. State what position the notice you put on bore to this little one.
A. Right over the top of it.
Q. That was the notice you put up yourself?
A. Yes.
Q. Where did you get that notice you put up?
A. John Flaherty gave it to me.
Q. Did you see it written?
A. I don't know but what I did. I seen Jack Smith write notices for the locations when they was coming up the next morning.
Q. Did you see Flaherty write this notice?
A. I did not.
Q. When did you put that notice up?
A. On the 18th.
Q. What time of day on the 18th?
A. Maybe 10 o'clock or 11 o'clock.
Q. Where was Mr. Devine at that time?
A. I don't know.
Q. Did you see him on the morning of the 18th?
A. I did.
Q. Where was he when you saw him?
A. With John Flaherty.
Q. Whereabouts?
A. Over on what we call the Sheridan.
Q. How far was that from this point where you posted the notice?
A. Maybe 1,500 or 1,800 feet; maybe 2,000.
209 Q. Did you see him at any other place during that morning?
A. He came up with us that morning.
Q. Came up where?
A. Up the gulch.
Q. Did you see him on the hill where these claims are located or in the vicinity of the discovery that morning?
A. I did not.
Q. Did you see him after he came away from the Sheridan with John Flaherty?
A. I did not.
Q. You spoke of seeing a notice destroyed by the weather or wind in the spring of 1886.

Counsel for the plaintiff makes a correction of the word notice to the word paper.

Q. State whether or not that paper is the one you spoke of as having put on the claim.
A. Yes.
Q. State whether or not you have seen the small notice over which you put the larger one.
A. That was also blowed out in the centre.
Q. What portion of it was left on the tree, if any?
A. Around where the pegs were stuck in around the rim.
Q. Was any portion bearing writing left?
A. No.
Q. These notices were completely destroyed by the elements?
A. Yes.
Q. Now, then, did you mark the boundaries of that claim or assist in it?
A. I did.
Q. When; on what day?
A. On the 18th.
Q. What did you do on the 18th?

Counsel for the plaintiff moves to strike out the answer of the witness about marking the boundaries of the claim as incompetent and immaterial. Motion denied.

Q. What did you do toward marking the boundaries of the claim?
A. We got an axe and went to squaring posts.
Q. Where did you go first?
210 A. Started on the northwest corner.
Q. State what you did there.
A. We hewed a tree and squared it; went up the hill and made the centre.
Q. Were any marks placed upon these posts or trees?
A. John was marking them and I was blazing them.
Q. John Flaherty?
A. John Flaherty.
Q. He was one of the locators with you?
A. Yes.
Q. He was marking and you were blazing them?
A. Yes.
Q. What did you do at the northwest corner?
A. We also done the same there; made a corner there.
Q. State whether you saw him mark it at all.
A. I did.
Q. What were these stakes and trees marked for?

Counsel for the plaintiff objects to the question, as the marking speaks for itself. Objection sustained.

Q. What did you hew these trees for, and stakes?
A. Boundaries of the Emma.
Q. To mark what boundaries?
A. The west boundaries.

Q. What did you hew the first you have spoken of for, to mark what corner?

A. The northwest corner.

Q. The next one?

A. The west centre end.

Q. The next one?

A. The southwest corner.

Q. On what day of the month do you say it was?

A. On the 18th.

Q. What time of day?

A. Maybe noon when we got around there. I cannot guess within an hour or two.

Q. You say you posted the larger notice on the 18th?

A. Yes.

Q. That was on the same day you marked these trees, was it?

A. Yes.

Q. State if you know anything of the marking of the boundaries at the east end—if you saw it done.

211 A. I did.

Q. By whom?

A. John Flaherty and John Smith here. John went down to help him.

Q. What day did you see that done?

A. Same day.

Q. You say John went down to help him?

A. We both went down.

Q. On the same day?

A. Yes.

Q. What was done toward marking that end?

A. They were marking the trees to help put in some cribbing to hold some posts they put up—piled some cribbing. It was all rocks and boulders.

Q. What was the surface of the ground, as to being smooth or rough?

A. Where?

Q. Around the east end.

A. It was big boulders and rough rocks.

Q. What was the condition of the surface ground of that claim, taking it generally over—was it level or hilly or smooth?

A. It stands pitching down to the north—pitching toward the east. There was no level ground on it.

Q. Do you know what these posts and trees were being marked for on the east end? What was the object in hewing them and marking them?

A. For the east end of the Emma claim.

Counsel for the plaintiff objects to any but his own object in doing it.

Q. What was your object?

A. For staking the claim, I suppose.

Counsel for the plaintiff makes a correction of the word notice to the word paper.

Q. State whether or not that paper is the one you spoke of as having put on the claim.
A. Yes.
Q. State whether or not you have seen the small notice over which you put the larger one.
A. That was also blowed out in the centre.
Q. What portion of it was left on the tree, if any?
A. Around where the pegs were stuck in around the rim.
Q. Was any portion bearing writing left?
A. No.
Q. These notices were completely destroyed by the elements?
A. Yes.
Q. Now, then, did you mark the boundaries of that claim or assist in it?
A. I did.
Q. When; on what day?
A. On the 18th.
Q. What did you do on the 18th?

Counsel for the plaintiff moves to strike out the answer of the witness about marking the boundaries of the claim as incompetent and immaterial. Motion denied.

Q. What did you do toward marking the boundaries of the claim?
A. We got an axe and went to squaring posts.
Q. Where did you go first?
210 A. Started on the northwest corner.
Q. State what you did there.
A. We hewed a tree and squared it; went up the hill and made the centre.
Q. Were any marks placed upon these posts or trees?
A. John was marking them and I was blazing them.
Q. John Flaherty?
A. John Flaherty.
Q. He was one of the locators with you?
A. Yes.
Q. He was marking and you were blazing them?
A. Yes.
Q. What did you do at the northwest corner?
A. We also done the same there; made a corner there.
Q. State whether you saw him mark it at all.
A. I did.
Q. What were these stakes and trees marked for?

Counsel for the plaintiff objects to the question, as the marking speaks for itself. Objection sustained.

Q. What did you hew these trees for, and stakes?
A. Boundaries of the Emma.
Q. To mark what boundaries?
A. The west boundaries.

Q. What did you hew the first you have spoken of for, to mark what corner?

A. The northwest corner.

Q. The next one?

A. The west centre end.

Q. The next one?

A. The southwest corner.

Q. On what day of the month do you say it was?

A. On the 18th.

Q. What time of day?

A. Maybe noon when we got around there. I cannot guess within an hour or two.

Q. You say you posted the larger notice on the 18th?

A. Yes.

Q. That was on the same day you marked these trees, was it?

A. Yes.

Q. State if you know anything of the marking of the boundaries at the east end—if you saw it done.

211 A. I did.

Q. By whom?

A. John Flaherty and John Smith here. John went down to help him.

Q. What day did you see that done?

A. Same day.

Q. You say John went down to help him?

A. We both went down.

Q. On the same day?

A. Yes.

Q. What was done toward marking that end?

A. They were marking the trees to help put in some cribbing to hold some posts they put up—piled some cribbing. It was all rocks and boulders.

Q. What was the surface of the ground, as to being smooth or rough?

A. Where?

Q. Around the east end.

A. It was big boulders and rough rocks.

Q. What was the condition of the surface ground of that claim, taking it generally over—was it level or hilly or smooth?

A. It stands pitching down to the north—pitching toward the east. There was no level ground on it.

Q. Do you know what these posts and trees were being marked for on the east end? What was the object in hewing them and marking them?

A. For the east end of the Emma claim.

Counsel for the plaintiff objects to any but his own object in doing it.

Q. What was your object?

A. For staking the claim, I suppose.

Q. You said you saw Devine on the 18th, with John Flaherty, going to Richmond?
A. Yes.
Q. Did you see him at the time the east end stakes were marked?

Counsel for the plaintiff objects, because the witness has not testified that he ever marked the east end.

Q. Are you a citizen of the U. S.?
212 A. I am.
Q. Native born?
A. Yes.
Q. Do you know such a mining claim as the Stemwinder?
A. I do not, only by reports around—hearsay.
Q. Did you ever see the notice on the Stemwinder claim?
A. I did.
Q. Notice of location?
A. I guess it was a notice of location that I saw.
Q. Did you ever assist in measuring from a notice that was posted on that claim to ascertain the width of a claim for fixing any point?

Counsel for the plaintiff objects to the question upon the ground, first, that the witness has already said that he did not know the boundaries of the Stemwinder, only from reports, and that the question itself is incompetent and immaterial and leading, and constitutes no act of original location or of title. Objection was overruled; to which ruling the plaintiff then and there excepted.

Q. Did you ever have any controversy as to where the true line between the Emma Lode claim as you have described it as located and where the Stemwinder was?
A. Yes.

Objected to by the counsel for the plaintiff upon the ground that the same was incompetent and immaterial, and that conversations are not admissable, being parole and void under the statute of frauds, and that they constitute no act of title or of valid location or otherwise, and are immaterial and incompetent to establish title to a mining location in any manner. The objections were overruled by the court; to which the plaintiff then and there excepted, and the answer allowed to go to the jury.

Q. Did you ever have any controversy about it?
A. I did.
Q. With whom did you have such controversy about it?
A. With Sandy Devine and Tim. Smith.
213 Q. Who were they?
A. Supposed to be locators of the Stemwinder.

Counsel for the plaintiff objects unless the witness knows.

Q. Was that controversy settled between you in any way? I will ask the question more definitely: Did you do anything toward settling that controversy?
A. We did.

Q. What was it?

Objected to by the plaintiff upon the ground that it is incompetent and immaterial and the evidence is inadmissable to show the boundaries and extent of mining claims and constitute- no act of location or of title, and can neither vest or divest title to a mining claim, and an agreement as to a mining claim cannot be shown by parole or any parole agreement concerning the transfer or abandonment of any portion of the land of a mining claim. The court, before passing upon the question, allowed the following questions to be asked and the following answers to be given by the witness:

Q. Was this settlement, as you call it, in writing?
A. No.

Q. It was by parole—verbal?
Counsel for defense objects to the question as immaterial.

A. No.
Q. It was not in writing and not parole then?
A. No; it was a monument.
Q. Was there any evidence of writing about it?
A. Not that I know of.
Q. You know of no writing as one of the locators?
A. No.
Q. You know of no writing in existence settling the boundary line or any monument?
A. No; I do not.
Q. What you are going to testify to——

Objection by counsel for defense.

Def. Q. What did you do to settle the boundaries between these two claims?

Counsel for the plaintiff then renews his former objection to the admission of the testimony as incompetent and immaterial, because the testimony shows that it was parole, and that the Emma
214 must be shown to be a valid existing location before any settlement, parole or in writing, can be had, and that no right or title in any mining claim or settlement of the boundaries thereof is valid except the evidence thereof be in writing; that no estate or interest in real estate or mining claims or any trust or power over or concerning the same or in any manner relating thereto can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law or conveyance or other instrument in writing, subscribed by the parties creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing, and that the defendant has not shown a valid or any location of a mining claim. This witness from his answers has shown that he is incompetent to answer as to the boundaries of the Stemwinder.

The court finally said that he couldn't at this time make a ruling, because there were two points he had to anticipate.

215 J. L. SMITH, a witness on the part of the defendant, being called, sworn, and examined, testifies as follows:

Q. Do you know a mining claim called the Emma, in Yreka mining district, etc.?

A. Yes.

Q. By whom, if you know, was it located?

A. John Flaherty, Mike Carlin, and myself and John Burke. I don't think he was there when it was located, but he was one of the partners.

Q. Are you a citizen of the United States?

A. Yes.

Q. Native-born?

A. Yes.

Q. When did you first go upon the ground?

A. 17th of September, 1885.

Q. What, if anything, did you do upon the ground on that day?

A. I don't know. I did not do anything myself, except to write a location notice with John Flaherty.

Q. From where did you go when you went upon the ground? Where had you been?

A. From Tom Erwin's old ranch, on Jackass prairie.

Q. What were you doing there?

A. We came down and made camp there.

Q. Who was camped with you?

A. John Flaherty and Mike Carlin and Sandy Devine. Sandy Devine came down with us on the 17th.

Q. Do you know, had Sandy Devine been there before the 17th?

A. Not to my knowledge.

Q. You are acquainted with him?

A. I got acquainted with him over there on the 17th. I never heard of his being in Milo gulch before the 17th.

Q. You were there before the 17th yourself?

A. I was not down on the main creek. I was up on the hill on the east fork; not where the Town of Wardner stands now.

Q. You say you went upon the ground on the 17th?

A. Yes; the 17th of September.

Q. State what you did about writing the notice before leaving Jackass prairie.

A. I did not write any notice in Jackass prairie.

216 Q. Did you see any written?

A. Devine wrote one.

Q. Did you see it?

A. Yes.

Q. Read it?

A. Yes; I either read it or he read it to me. I remember the notice.

Q. You saw it?

A. Yes.

—. See its contents?

A. Yes.

Q. What was it. What did it purport to be?

A. Well, I cannot tell the exact words. I know pretty near. It was on an ordinary sheet of paper—writing paper. I gave him the paper; John Flaherty gave him the pointers to write it. We had been up there. He had not been up there.

Q. You say he had not been up there?

A. No. Flaherty gave him the pointers and told him he had been up there; said everything run east and west. I remember that he left a blank. We described it as near as we could 2½ miles southeast of Jackass prairie. I remember the name Stemwinder, and he appeared to be about as much pleased with the name as the mine when he found it. That was on the 17th of September, before we went up.

Q. You went up on the 17th of September on this ground?

A. Yes.

Q. What did you do there on that day with reference to locating any claim or rather this claim?

A. The Emma?

Q. Yes.

A. I wrote the location notice for John Flaherty.

Q. What did you do with it after you wrote it?

A. Gave it to Flaherty and he started up on the hill with it.

Q. Pros. What notice was that?

A. Emma.

Q. When did you see it?

A. On the 20th.

Q. Where was it when you saw it?

217 A. Posted at the point of discovery, on a dry tree.

Q. What claim, if any?

A. On the Emma.

Q. When did you last see the notice?

A. I think the notice remained there for a long time. I think it was there until it wore out—all that fall and winter; maybe the next spring.

Q. When you last saw it what was its condition?

A. The writing had all faded and the wind had blowed it away. It was all wore out.

Q. Was any portion of the writing remaining on it?

A. I don't think there was; there might have been a word or two, but you could not read it; it was all faded.

Q. State what became of the body of the paper, if you know.

A. I think it remained on the tree until it blowed away and wore out, and if I am not mistaken I put up a new one next spring.

Q. This location you speak of seeing worn out was the one you wrote and gave to Flaherty?

A. Yes.

Q. State when you gave it to Flaherty.

A. 20th of September, in the morning.

Q. You say he started up the hill with it; who was with him?

A. Carlin was around there in some place; may have been with him.

Q. State whether you made a copy of this notice.
A. I did.
Q. Or had a copy of it made?
A. I done both, made a copy of that and had a copy of it made.
Q. What did you do with the copy you had made of that notice?
A. Had it recorded.
Q. Will you look at that notice? (Paper shown witness.)
A. Yes; I remember that notice.
Q. You recognize that notice?
A. Yes.
Q. Do you know who wrote it?
A. Yes.
Q. Who?
A. Harry Hall.
Q. Do you know from what data he wrote it?
A. Wrote it for me.
218 Q. For you?
A. Yes.
Q. State where he got the information from which he wrote this notice.

Counsel for the plaintiff objects to the question on the ground that the notice speaks for itself, and as immaterial and incompetent.

COURT: Is this the recorded notice?
Def. Yes.

Whereupon the objection is overruled by the court; to which ruling the plaintiff then and there excepts.

Q. Where did he get the information from which he wrote that notice?
A. The notice I wrote for Flaherty on the 17th, I saw it on the stake on the 20th, and on the 20th I made a copy. I did not have much paper and I made a copy of one other notice, and when I came into town I intended to copy it off on another sheet of paper or printed blank, and I was in a hurry and got Harry Hall to copy it, and I read the notice to Harry Hall and he wrote it off, and that is the one I took and recorded.
Q. State whether or not this notice contains in substance all that the notice contained on the claim that you testified to.

Counsel for the plaintiff objects to the question as incompetent and immaterial; which objection is overruled by the court; to which ruling the plaintiff then and there excepted.

A. Substantially the notice is the same, but the printed stuff on here was not on the notice on the tree; the other words on the tree in the notice is in here. It is substantially the same notice, but every word on notice on tree is here.

Counsel for the defense offers in evidence the notice of location of the Emma as recorded; to which objection is made by the plaintiff upon the ground that he did not copy it from the notice, but from

a copy that was a copy of the notice, and as incompetent and
219 immaterial; that the printed matter was not in the notice posted up; that Harry Hall did not copy the notice as stuck upon the claim, and it is not a copy of it; furthermore, it does not contain such a description of the premises sought to be located by reference to natural objects or permanent monuments or even artificial monuments as to identify the claim; that it is not a copy of any notice of location posted on the claim and is void for uncertainty, the description therein being vague, indefinite, and not according to the ground as staked out. Objection overruled by the court; to which ruling the plaintiff then and there excepted, and excepted to the accepting and reading of the exhibit in evidence; but the court admitted the said paper marked Exhibit D, defendant, to wit:

By the COURT:

Q. Did you correctly read to Mr. Hall what you had copied?
A. Yes; I had it written down on a sheet of paper with another notice below it, and I read it to Harry Hall and he copied it onto this.

220 *Notice of Location of a Quartz Claim.*

Notice is hereby given to all whom it may concern that John Flaherty, J. L. Smith, M. Carlin, and John M. Burke, citizens of the United States, over the age of twenty-one years, having discovered a vein or lode of quartz or rock in place bearing silver and gold, etc., within the limits of the claim hereby located, have this day, under and in accordance with the Revised Statutes of the United States, chapter six, title thirty-two, located fifteen hundred linear feet of this vein or lode, with surface ground six hundred feet in width, situated in Yreka mining district, county of Shoshone, and known as the Emma quartz mining claim, and extending 1,000 feet east and 500 feet west from this notice at the discovery or prospect shaft, which is 500 feet westerly from westerly end line, the exterior boundaries of this claim being distinctly marked by reference to some natural objects or permanent monuments, and more particularly described as follows, to wit, on Iron creek, about two and one-half miles in southerly direction from Jackass prairie, and being northerly and adjoining the Stemwinder, and we intend to hold and work said claim, as provided by the local customs and rules of miners and the mining statutes of the United States.

Dated on the ground this 17th day of September, 1885.

JOHN FLAHERTY,
J. L. SMITH,
M. CARLIN,
JOHN M. BURKE,
Locators.

Discovered September 17th, 1885.
Located September 17th, 1885.

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

I, John Flaherty, do solemnly swear that I am acquainted with the mining ground described in the notice of location herewith, called the Emma ledge, lode, or claim, and that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been heretofore located according to the laws of the United States and of this Territory, or, if so located, that the same has been abandoned or forfeited by reason of the
221 failure of such former locators to comply in respect thereto with the requirements of said laws.

JOHN FLAHERTY.

Subscribed and sworn to before me this 22nd day of September, 1885.

THOS. E. McLELLAND,
County Recorder.

Endorsed: 837. Emma lode. John Flaherty, J. L. Smith, M. Carlin, J. M. Burke. Filed for record September 22nd, 1885, at 2 o'clock p. m. At request of John Flaherty, recorded in Book C of Quartz Locations, page 288. Thos. E. McLelland, county recorder. Recorded, at request of Thos. E. McLelland, county recorder, this 5th day of April, 1886, on page 139, Book A of Quartz Locations, Yreka District. J. C. Colwell, deputy recorder. Exhibit C, defendant. Filed September 27th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

222 Q. You state that you wrote that notice that was posted on the claim. State whether or not that notice contained the date of location.

A. It did.

Q. State whether or not it contained the names of the locators.

A. Counsel for the plaintiff objects to the question on the ground that the defendant has not shown that they have even recorded a copy of that notice. Objection overruled by the court; to which ruling the plaintiff then and there excepted.

Q. State whether or not it contained the names of the locators.

A. It did.

Q. State whether or not it contained the amount of ground claimed in each direction from the point of discovery.

A. It did.

Q. State whether or not it contained the name of the claim.

Counsel for the plaintiff objects to the question as leading.

Q. State what it contained.

A. The whole notice?

Q. Yes.

A. I can give you nearly line for line of the whole notice.

COURT: Give it to the best of your recollection.

A. Notice is hereby given that the undersigned located 1,500 feet, commencing at this notice posted at the point of discovery, 500 feet westerly and 1,000 feet easterly, together with surface ground 600 feet in width, situated in Yreka mining district, Shoshone county, Idaho, and more particularly described as follows: adjoining the Stemwinder, 2½ miles southeasterly from Jackass prairie and ½ mile from Milo creek, and giving the date 17th of September, and John Flaherty, John Burke, J. L. Smith, and Mike Carlin. That may not be word for word, but it is very nearly like it.

Q. Mr. Smith, state whether or not anything was done to mark the boundaries of this claim.

A. On what day?

Q. At any time after the 17th of September, or on the 17th or 18th.

A. I don't know of any stakes being put up on the 17th, except I saw this notice on the 20th. On the 18th or 19th, I
223 helped put up some stakes on the east end.

Q. What stakes did you put up?

A. Some stakes on the east end.

Q. At what points? Describe the stakes and the places where they were.

A. On the morning of the 18th or 19th Flaherty told me he was going to stake out the claim and he and Carlin was going to put up the stakes on the west end, and I was to put up the stakes on the east end. I went to the southeast corner and put up a stake—blazed tree—and marked it the southeast corner of the Emma and put on the date. I went about 300 feet and put up another stake. This was a dry tree about a foot through, blazed on four sides, and marked it east centre end stake of the Emma, and went about 300 feet more—might have been 400—put up another stake and marked it northeast corner of the Emma.

Q. State at the time you were making the southeast corner stake you saw Devine.

A. Southeast corner?

Q. About that time or any other of these stakes.

A. Yes; when I went to put up these stakes I went up to the Bunker Hill. I don't know whether he had started or not, but the centre end stake was up. When I got about the corner—that would be the northeast corner of the Bunker Hill—I saw Devine there. Devine was there, anyway.

Q. Any one with him?

A. No; I don't think there was. I said to him, They are going to stake out the Emma and you had better stake out your claim, and he said, I will not wait any longer for Phil. O'Rourke. I remember a tree a foot and a half through and he commenced blazing it. I don't know whether he blazed it on all four sides or not. I stepped off 700 feet and put up this first stake of the Emma, which would be the southeast corner stake of the Emma; then I kept on and put up the other stakes.

Q. What time of day was this?

A. Well, I think it was in the morning. I am not sure, but I think it was 9 or 10 o'clock. Just how early I cannot tell; probably 8 or 9 or 10 o'clock.

224 Q. State if you saw at or about that time anything at the point of discovery of the Emma.

A. Yes.

Q. State what you saw.

A. We had galena in place, sol d, and there was some quartz iron or quartz sticking out.

Q. Where was it with reference to the notice you say you saw?

A. 5 or 10 feet. There was galena sticking out of the ground in several places.

Cross-examination:

Q. That was the time you saw the location notice?

A. That was the time I saw the mineral and the notice.

Q. And it was the time also you saw this notice?

A. I saw the notice on the 20th and could have seen it on the 18th or 19th, but I am not positive I went there; but I am positive on the 20th.

Q. And when you did go there you saw this notice?

A. Yes; the notice I had written on the 17th.

Q. You say that you wrote the notice?

A. Yes.

Q. Was it in that notice that this Emma claim was north of and adjoining the Stemwinder?

A. I only wrote one notice on the 17th, I think.

Q. Was it this one here?

A. I never changed it. It is the one I wrote out on the 17th.

Q. I did not say you did.

A. Well, that is the one which reads——

Q. Being northerly and adjoining the Stemwinder; that is correct, is it?

A. That is correct.

Q. You say on the 18th or 19th you went up there to stake the east end of the Emma?

A. Yes.

Q. And you met Sandy D-vine there?

A. He was there. At any rate, I saw him there at that time.

Q. What was the full conversation there between you and him?

A. I was quite busy then. We did not have much conversation. I think I have stated all there was in it.

225 Q. Was it as you went up the gulch or came down the gulch?

A. I think I had been at the Bunker Hill and coming back about 300 feet. I think I said the east centre end stake of the Bunker Hill. I went there for two reasons: one to locate a fraction——

Q. You had been up the creek?

A. I had been up the creek.

Q. You had been south?

A. Yes.

Q. Up about the Bunker Hill?

A. Yes.

Q. And as you were coming down the creek you met Devine? What was Devine doing when you met him?

A. I cannot say that he was doing anything at the time I remember seeing him there. He was coming along——

Q. Did you go to the Stemwinder discovery that morning?

A. Morning of the 18th or 19th?

Q. Yes.

A. No.

Q. Had you been there on the 17th?

A. No; I had not been to any discovery of the Stemwinder on the 17th.

Q. When did you first see the discovery of the Stemwinder?

A. On the 20th.

Q. Same time you saw the Emma?

A. Yes.

Q. See a notice there then?

A. Yes.

Q. Was it the same notice that you speak of?

A. No.

Q. What notice was it?

A. Notice on a stake.

Q. That was on the 20th?

A. Yes.

Q. Was it the stake that has been in court here?

A. I cannot say I recognize that stake. If I could see the notice like what was written, then I would recognize it; but the stake, I cannot remember whether it was round or square. The notice attracted my attention because it was longer than written down at Jackass prairie.

226 Q. What time of day was it the morning you came down the gulch and met Sandy Devine?

A. I cannot say; I think it was before noon—8 or 9 o'clock; possible 10; may have been a little earlier.

Q. Please repeat what conversation took place between you and Devine when you met there, as near as you can.

A. When I came down the gulch, about 300 feet north of this centre end stake of the Bunker Hill, I met Devine. I told him we were going to stake out the Emma that day and he had better stake his, or some words to that effect. He said: I will not wait any longer for Phil. O'Rourke, and I will commence to stake mine, and he went up to this tree and commenced blazing. I don't remember whether he made a stake or what he done. He went to blazing and I left him.

Q. Did you ever see the tree he was blazing afterwards?

A. Well, yes; I am not positive; I might have seen the tree, but did not pay any attention to it.

Q. What corner of the Stemwinder was that?

A. I don't know that it was any corner.

Q. Don't you know where it was?

A. Yes; it was somewhere near where the southeast corner of the Stemwinder was.

Q. The southeast?

A. Somewhere near there.

Q. What did you do then?

A. Stepped down 600 or 700 feet and put up the east end stake.

Q. Tell the jury why you stepped off 6 or 700 feet from there.

A. Yes, sir. I understood that Devine had a claim there and I left him 6 or 700 feet. The ground was plenty then; I did not want to crowd him. I think it was 700.

Q. You were sure you were going to leave him enough?

A. Yes; the ground was plenty; might be different now, maybe.

Q. When you stepped off that distance what did you commence doing?

A. Commenced making the southeast corner stake of the Emma.

Q. How far was that Emma stake from what since has been known as the south or the northeast corner of the Stemwinder?

A. It was across the creek and somewheres east, and left a
227 little fraction in there.

Q. How much did it keep from being on the line?

A. How much fraction would it leave between the two claims?

Q. How far would they be from being on a line together?

A. A little fraction would be there; maybe about 50 or 100 feet. It left him more than 100 feet fraction on east end.

Q. I will ask you if in the conversation the evening before, when this notice was written, if it was not understood that Devine had the Stemwinder and was very much pleased with the name and with the Stemwinder lode.

Counsel for the defense objects to what was understood.

A. That was on the morning of the 17th, about 11 o'clock. I was cooking dinner then; it was early noon.

Q. Where was it?

A. At Jackass prairie, probably a couple of hundred yards from John Olden's house, in the field; that was where Devine wrote the notice of the Stemwinder.

Q. Was that your camp down there?

A. Yes; that was our camp.

Q. Do you know who staked the west end of the Emma?

A. I come pretty near knowing. I did not see the stakes put up.

Q. I am speaking about your own knowledge?

A. My partners, Flaherty and Carlin.

Q. Do you know that of your own knowledge?

A. I did not put the stakes up, but I saw them the 20th and recognized Flaherty's handwriting on the 20th. He told me he put them up and marked them. Flaherty marked all the stakes.

Q. Did you go up on the 20th to see them?

A. Went up on the 20th to locate an extension to the claim on the west end of the Emma, and wanted to go to the Emma for a starter, and went to some Bunker Hill stakes, and went to all the stakes I could find there.

Q. Did you make a location up there on that day?
A. Yes.
Q. What was the name of it?
A. Forest Bell.
Q. You say that was the 20th?
A. That was the 20th of September.
228 Q. When did you afterwards see the discovery point of the Emma?
A. Oh, I saw it perhaps—not every day, but once or twice a week until about the first of November. We came to town then. I came in about the first of November and stayed until about the middle of January, and I was there several times after that. I bonded it.
Q. On the east end? You don't know anything about the west end?
A. I got a good idea about both ends.
Q. I understood you to say you did not stake the west end. That is all I mean. If you did you can say so.
A. I say my partners did it.
Q. You were not there?
A. No; but my partners told me, and I saw his handwriting and recognized it.
Q. You saw it on the 20th?
A. Yes.
Q. You saw his handwriting on the 20th?
A. Yes.
Q. Please tell me what was the southeast corner.
A. The southeast of the Emma?
Q. Yes.
A. It was a dry tree; could not say just how big; it was a tree, probably 6 or 8 or 10 inches; I don't remember just how big a tree it was.
Q. You blazed that yourself?
A. Yes.
Q. And marked it yourself?
A. Yes.
Q. Which side of the creek was it on?
A. The east side of the creek.
Q. Was it a pine or a fir or what?
A. It might have been a cedar—bark was off. It was a dry tree—might have been a pine. I think it was a pine.
Q. Is it standing there yet?
A. No.
Q. When was the last time you saw it?
A. She went away, probably, December, the first year; it might have been November; it was gone the middle of January.
Q. That was December, 1885?
A. Yes.
229 Q. Has there been any other stake there since?
A. I did not see any one take it away, but I understood some one took it away. I put up another stake in its place; might

have put it up a little closer to the creek. Put it up in January, anyhow.

Q. January, 1886?

A. January, 1885.

Q. Not January, 1886?

A. No; in January, 1885.

Q. Is that stake there yet?

A. I don't think it is. I never looked particular.

Q. When was the last time you saw it?

A. I cannot say. I probably saw it there that winter. I think I kept track of it until I bonded it. I never paid any attention to the stakes after March, 1886, when I bonded it.

Q. Tell the jury how tall the stake was and the size.

A. Probably 4 or 5 feet above the ground and 6 or 7 feet high. It was over 4 feet.

Q. Did you put any rocks around it?

A. No; I don't know that I did.

Q. Plant it in the ground?

A. Yes; made it so she would stand up? Dug a hole with a pick and stuck it down.

Q. That was in——

A. I think it was in the winter of 1885 or January, 1886.

Q. It was in the winter of 1885-'6?

A. Yes; first winter we was over there.

Q. You don't know whether it is there now or not?

A. No; I have no idea.

Q. You put no other stake there since?

A. No; I have not.

Q. That was the last stake you put there?

A. Yes; the last stake I put at that corner.

Q. And that was on the west side of the creek—on the east side of the creek?

A. Yes; on the east side of the creek.

Q. How near the creek?

A. Oh, I didn't pay much attention. Let me see—10 or 20 feet; very close to the creek. I didn't pay much attention.

Q. I will bring you to the northeast corner. What did
230 you put up there?

A. Well, I could not say whether it was a tree or stake. When a tree was convenient we put up a tree, and when there was not we took a stake.

Q. Either a tree or a stake?

A. Yes; a tree or stake. I remember the centre end stake plain enough.

Q. I want to get on to this one first—either a tree or stake, you don't remember?

A. No.

Q. What was the size of that?

A. Now, I could not say. It was a lawful stake if I put it up.

Q. How long did that stake stay there?

A. I cannot tell. I think it was there until the time I got out

of the ground, in March, 1886. It might have been a long time after that. I think it was there all the fall and that winter.

Q. Do you know what stake is there now?

A. No; I don't think there is any.

Q. How long since you saw that stake?

A. I didn't pay any attention. I might have seen it a year ago; might not have seen it that winter.

Q. When did you notice it was gone?

A. After we was on the other side. After we went home I looked. Mike Carlin came to me——

Q. When was it Mike Carlin came to you?

A. Some time since court adjourned the other time.

Q. Did any one else speak to you about the stake?

A. No.

Q. You think the last time you saw it was in 1886?

A. I guess so; might have been 1887.

Q. It was either a tree or a stake, you cannot tell which?

A. No.

Q. Can you tell the size?

A. No.

Q. Can you tell whether it was blazed?

A. I never put up a stake in my life unless it was blazed on four sides.

231 Q. Was it marked?

A. Yes.

Q. What was on it?

A. Northeast corner stake of the Emma, if it was on the northeast corner.

Q. Had the name of the mine on it, did it?

A. Yes; had the name of the mine on it.

Q. What name did it have on?

A. Emma.

Q. Did it have anything else on it?

A. I generally put the name of one or two of the locators on it and the date.

Q. Did that have it on?

A. I cannot swear, but I generally did it.

Q. I want to know now the east centre end.

A. Yes; I remember that.

Q. What was that?

A. Dry tree—about a foot tree; good, nice, dry tree—made a good stringer for a bridge, and Wardner took it out.

Q. Dry tree a foot through?

A. Yes; 12 or 15 inches.

Q. You marked and blazed that?

A. Yes; and when they built the wagon round there they graded it out.

Q. How long did it remain there?

A. It disappeared in November or December or the first of January. I came back the middle of January, and it was gone. It was there in November.

Q. Has any stake ever been put back there?
A. Yes.
Q. What did you put up?
Q. A big stake 6 or 8 inches through and 6 or 8 feet high—pretty big stake.
Q. Was it a stake or a tree?
A. That was a stake.
Q. Has it been there ever since?
A. It was there since I was owning the ground.
Q. When was the last time you saw it?
A. I don't know. I saw it after I sold out my interest.
Q. When was that?
232 A. March, 1886, I think, or April.
Q. The east centre end was a stake?
A. Yes.
Q. — inches through and marked?
A. Yes.
Q. Tell me what was the northwest corner.
A. I think a tree. I am not right positive about that.
Q. About the size of it?
A. That I cannot say.
Q. Don't you remember anything about it?
A. I remember it was a stake or tree; that is all I remember about it. I cannot tell the size.
Q. I understood you to say a while ago you had seen it and knew about it?
A. I know there was a stake there.
Q. I asked you the description of it.
A. I know it was a stake or tree and properly marked when it was put there.
Q. What was it marked?
A. If it was on the northwest corner, it was marked the northwest corner.
Q. Do you remember how it was marked?
A. Yes; I remember it was as I described it. If it had not been I would have marked it that way.
Q. You don't remember whether it was a stake or tree?
A. No.
Q. Nor its size?
A. No, not that one stake, I cannot say. I think it was a tree, but I am not positive. It could have been a stake.
Q. When did you last see that?
A. I know I saw it that fall. I don't know whether I have ever seen it since that or not; might have seen it since.
Q. Been upon the ground lately to see if it is there?
A. No; I have not.
Q. When was the last time you was there?
A. On that claim?
Q. Up to see the west end.
A. I went to the west end, but I did not go to that corner. I remember going——

233 Q. Can you tell the size of the tree on the northwest corner?

A. No; I don't seem to remember; I might think of it some other time, but just right now I don't remember the size of it.

Q. Remember what was marked on it?

A. I remember it was properly marked, the northwest corner stake of the Emma.

Q. Go to the southwest corner; what was there?

A. I don't remember whether that was a stake or a tree; I know that was a corner, and that it was marked.

Q. Do you remember anything about the size?

A. No.

Q. Large or small?

A. No; all I remember is it was a good stake; had been a stake or tree.

Q. I would like to know if you remember which it was?

A. If it was a foot tall or two inches I would have put up a lawful stake myself, but I mean to be understood it was a stake that came outside of the law, and I know the corner was properly marked.

Q. Don't you remember anything about the size of it?

A. No.

Q. Whether an inch in diameter?

A. I know it was 4 inches.

Q. Do you think it was 8 inches in diameter?

A. Well, I don't know.

Q. Was it squared or simply blazed?

A. Blazed on four sides.

Q. About the west centre end?

A. I remember that.

Q. What was that?

A. A good-sized tree, probably a foot or two through, and had the bark on; whether it was a green or dry tree I don't know, but it had the bark on—a good big tree.

Q. Dead or alive?

A. I think it had been burned, but the bark was on it, I know.

Q. How was that marked?

A. That was marked the west centre end stake of the Emma claim.

Q. How big was that tree?

234 A. That tree was probably 18 inches and probably 2 feet through; maybe 20 inches or two feet through at the bottom—good-sized tree.

Q. When were you first at the discovery of the Emma?

A. On the morning of the 20th, that I know of; I might have been there before.

Q. You remember the morning of the 20th?

A. Yes.

Redirect examination:

Q. Why, in the notice you wrote, did you say adjoining the Stemwinder? Explain the circumstances.

Counsel for the plaintiff objects to the question as incompetent and immaterial. Objection is sustained by the court; to which ruling the defendant excepts.

Q. Had the Stemwinder been located at the time you wrote this notice, the original Emma notice, posted on the claim?

Counsel for the plaintiff objects to the question as incompetent and immaterial; which objection is overruled by the court; to which the plaintiff then and there excepted, and the witness answered:

A. At the time I wrote the first notice, on the 17th?
Q. Yes.
A. I don't think that they had.
Q. Do you know they had not?

Counsel for the plaintiff objects to question as leading; which objection is sustained by the court.

Q. What do you mean by—or do you know what was referred to when Devine said he would not wait for Phil. O'Rourke any more?
A. I can give my understanding of what I learned by conversation.

Counsel for plaintiff objects as incompetent and immaterial.

COURT: State what was said, and what they did, and where you left them.

235 A. I have stated; I can state it over again.
Q. Was that all Devine said, simply that he would not wait for O'Rourke any longer?
A. About all the conversation. I said I was going to stake this claim and he had better stake his, and he said he would go and would not wait for Phil. O'Rourke any more.
COURT: Then you walked off 6 or 700 feet?
PROS.: And he commenced to stake his?
DEF.: Yes.

236 MICHAEL CARLIN, a witness on the part of the defense, is then recalled, and testified as follows:

Q. Did you know where the discovery point and notice of the Stemwinder mining claim were situated?
A. Yes; I did.
Q. Did you ever see the discovery of the Stemwinder mining claim?
A. I saw what Sandy Devine showed me as the discovery—his notice.
Q. Did you ever see the notice of location of the Stemwinder mining claim at or near that point?
A. I stood within 5 feet of it.
Q. Was it pointed out to you as the notice of location by any person?
A. Sandy Devine.
Q. Did you ever measure a distance from that point of discovery,

where the notice was posted, in a direction practically at right angles with the claim as it was claimed at that time?

Counsel for the plaintiff objects to the question as incompetent, immaterial, and leading. Objection is overruled by the court; to which ruling the plaintiff then and there excepted.

A. I did.
Q. You may state what distance you measured.
A. We measured 300 feet.

Counsel for the plaintiff objects to what he measured from the Stemwinder, and as forming no basis or valid evidence as to a title or location of a mining claim or any act of location thereof, and is incompetent to prove the vesting or divesting of title to a mining claim. The objections are overruled by the court; to which ruling the plaintiff excepted.

Q. You say you did measure 300 feet?
A. Yes.
Q. Did you place any mark or monument to mark the point at which 300 feet came from the discovery of the Stemwinder?

Objection by plaintiff as incompetent, immaterial, and
237 irrelevant, and as being no act of location of a mining claim and incompetent to vest or divest title and void under the statute of fraud. The objection was overruled by the court; to which the plaintiff then and there excepted, and the witness was permitted to answer as follows: (That the court only allowed these questions for the purpose of showing that the Stemwinder was excessive in width, and expressly said that such testimony was not allowable to prove any parole agreement as to title.)

A. We did.
Q. Describe that monument which you placed at that point.
A. It was a rock monument.

Counsel for the plaintiff interposed the same objection to this last question, which the court overruled, and to which ruling the plaintiff excepted. That the court only allowed these questions for the purpose of showing that the Stemwinder was excessive in width, and expressly said that such testimony was not allowable to prove any parole agreement as to title.

Q. When was this done?
A. Perhaps three weeks after we made the Emma location.

Counsel for the plaintiff objects to the testimony as immaterial and moves to strike out the answers of the witness to the two last questions, including the last, upon the ground that they had already made the Emma location before the measurements were made, and that the same were incompetent and immaterial. The objections were overruled by the court and the answers of the witness were allowed to stand, and denied the motion of the plaintiff to strike out; to which ruling of the court the plaintiff then and there excepted. That the court only allowed these questions for the purpose

of showing that the Stemwinder was excessive in width, and expressly said that such testimony was not allowable to prove any parole agreement as to title.

Q. Was it done more than once?
A. It was.
Q. State how often, and the circumstances. State what you know about it.

238 Objection by counsel for the plaintiff as incompetent and immaterial to prove any question of title or of location; which objection is overruled, and the plaintiff excepted. (That the court only allowed these questions for the purpose of showing that the Stemwinder was excessive in width, and expressly said that such testimony was not allowable to prove any parole agreement as to title.) And the witness said:

Q. State what were the circumstances and who were present.
A. Jim Smith, Sandy Devine, and myself.
Q. When was this?
A. I should judge, about the 1st of October.
Pros. Q. Who did you say was present?
A. Jim Smith, Sandy Devine, and Mike Carlin.
Pros. Q. I did not understand the date either.
Def. A. He said it was about the 1st of October.
Q. State what you did.
A. Took a tape-line and measured across 300 feet.
Q. From what point?
A. From Sandy's discovery.
Q. On the discovery of what mining claim?
A. On the Stemwinder; that is what he told me.
Q. You measured 300 feet?
A. Yes.
Q. What did you do at the end of 300 feet?
A. Built a monument of rocks.
Q. What kind of monument was it? Describe it.

Counsel for plaintiff at this point objects to this testimony upon the ground that the same was immaterial and incompetent and constituted no act of location of a mining claim and cannot settle the boundaries between mining claims by parole, and then and there moved to strike the answers out concerning it, and any testimony as to any compromise line between the parties; whereupon the court said: He can state what he did with regard to the measurement and in regard to the placing of a post; and overruled the objection and the motion of plaintiff; to which ruling of the court the plaintiff then and there excepted.

239 Q. Describe more definitely, so as to identify it, as to about its size and height.
A. It was perhaps three feet high.
Q. Built of what?
A. Quartzite, I guess.
Q. Rocks?

A. Yes; loose shell rock.
Q. Piled up together?
A. Built upon monuments. We built two of them.
Q. Where were they with reference to each other?

Objected to by plaintiff's counsel as incompetent and immaterial; which objection is overruled, and the plaintiff excepted.

A. I built one above him about 10 feet.
COURT: Go on and state about the monument.
A. Well, we built this monument; that is about all I know about it.
Q. Did you ever identify that monument by pointing it out to any person?

Counsel for the plaintiff objected to the question as immaterial; which objection is sustained by the court.

Q. Did you ever identify it by pointing it out to any person in the presence of Sandy Devine?

Counsel for the plaintiff objects to the question as immaterial; which objection is sustained.

Q. State if it was built in the presence of Sandy Devine.

Counsel for the plaintiff objects to the question as incompetent, irrelevant, and immaterial. Objection overruled by the court; to which ruling the plaintiff excepts.

A. He helped build it.

Counsel for the plaintiff moves to have the answer of the witness stricken out; which motion is sustained by the court.
Q. Did you point out this monument in the presence of Sandy Devine at any time?

Counsel for the plaintiff objects to the question as incompetent and immaterial as to who pointed it out or when it was pointed out, and not competent to show location or title. Objection
240 is sustained by the court; to which the plaintiff then and there excepted.

Q. Did you measure at any other time?
A. Yes.
Q. State when, under what circumstances.
A. Me and Devine measured it once after that.
Q. Did you see him do it?
A. I had hold of one end of the tape-line and he had the other.
Q. What was the result of that measurement?

Objected to as immaterial by the plaintiff; which objection is sustained by the court.

Q. What was the result of this last measurement? Did it change the former one?
A. No.
Q. Did you measure it at any other time?

A. Me and Flaherty measured it.
Q. What was the result of that measurement?
A. 5 feet difference.
Q. In which was that 5 feet?
A. It was to the north?
Q. Explain that. Was it 305 feet or 295?
A. About 295 feet—no, about 305 feet.
Q. Was it too far over?
A. Yes; me and Devine measured it once and me and Flaherty measured it, and then me and Devine measured it over again.
Q. Do you know about any change being made in the position of the discovery post or notice of the Stemwinder after the location of the lode?
A. Yes.
Q. State what you know about it.

Counsel for the plaintiff objects to the question as immaterial and irrelevant and incompetent; which objection is overruled; to which ruling the plaintiff excepts.

A. They moved it about 80 feet north.
Q. When did they do that?
A. That was about a month after those locations were made.
Q. Was that before or after the measurements?
A. After the measurements.
241 Q. State whether that was before or after the location and staking of the Emma Lode claim.
A. A month afterwards.
Q. State who did that.
A. Sandy Devine; that is, he told me he had.

Counsel for the prosecution moves to strike out the answer of the witness; which motion is sustained by the court, and the defendant excepts.

Q. You saw it after it was changed?
A. He showed it to me when he had moved it.

Counsel for the plaintiff moves to strike out the answer of the witness unless he knows which motion is sustained, and the words "he told me where he had moved it" are stricken out; to which the defense objects.

Q. State any facts or circumstances that tend to fix in your recollection the original position of this post.
A. Which post?
Q. Where it originally was, of the Stemwinder.
A. It would stand right on a point of rocks where there was a little trail, and we had to hang on the rocks to get around. I picked it up about 20 or 10 times; used to often knock it down as I went around it. Picked it up and placed it back again.
Q. How was it fastened there?
A. It was not fastened at all. It was just leaning against the rock.

Q. You may state any declarations made by Devine upon the ground with reference to what this monument was placed there for.

Counsel for the plaintiff objects to the question as incompetent, immaterial, and hearsay. Objection sustained; to which defendant excepts.

Q. You may state whether or not any agreement was ever made upon the ground in controversy as to where the true boundary line between the Emma and Stemwinder Lode claims should be from the time of the agreement. Just state whether it was or not.

Counsel for the plaintiff objects to the question as incompetent and immaterial. Objection sustained; exception taken by defense.

242 Q. You may state whether or not the parties claiming the Emma and Stemwinder claims ever upon the ground in controversy marked or placed monuments to mark a boundary between these claims that was then agreed upon at the time the monuments were placed.

Counsel for the plaintiff objects to the question as incompetent and immaterial; which objection is sustained by the court; to which the defendant excepted.

Q. Did you ever have any conversation with Sandy Devine, the locator of the Stemwinder mining claim, with reference to the location of the north boundary line of the Stemwinder?

Counsel for the plaintiff objects to the question as incompetent and immaterial. Objection sustained, and exception taken by the defendant.

Q. State whether or not anything was at any time done by Devine and yourself upon the ground in controversy for the purpose of establishing the true boundary line between the claims.

Counsel for the plaintiff objects to the question as incompetent, immaterial, and cumulative. Objection sustained.

Cross-examination:

Q. Can you read writing?
A. Very little.
Q. At the time you speak of the notice, etc., could you read writing—ordinary handwriting?
A. What notice do you speak of?
Q. To what you spoke of seeing Flaherty write of the Emma notices.
Q. I saw him at a distance, I told you. I did not swear I did.
Q. You did not swear you read them?
A. I did not. I believe you understood me yesterday.

243 GEORGE R. TRASK, a witness on the part of the defense, is recalled, and testified as follows:

Q. You stated that you made an official survey of the Emma Lode claim for a patent.

A. Yes.

Q. Will you state who was present upon the ground at the time you made that survey?

Counsel for the plaintiff objects to the question as immaterial. Objection is overruled. Objection withdrawn.

A. There was Charles House, Dave Wiseman, Byron Flaherty, John Flaherty, Sandy Devine, —— Tyler.

Q. What Tyler?

A. I cannot think of his first name ever, of the Stemwinder Company, and Smith, of the same company, whose first name I do not know.

Pros. Q. Of what company?

A. Of the Stemwinder Company.

Pros. Q. The plaintiff?

DEF.: You need not answer, Mr. Trask. You may state if any one pointed you out the south line of the Stemwinder Lode claim for the purpose of making this survey.

Counsel for the plaintiff objects to the question as leading and immaterial. Objection sustained as to the use of the word line. Exception taken by defense.

Q. Did you survey any lines of the Emma Lode claim? State if any one pointed out the objects to which you made your survey on the south side of the Emma Lode claim.

A. Yes.

Q. Who?

A. John Flaherty, Sandy Devine, and this Mr. Tyler and Mr. Smith that I have just spoken of, who *are* interested in the Stemwinder at that time.

Q. State how you made your survey with reference to the objects they pointed out.

Counsel for the plaintiff objects to the question as incompetent and immaterial testimony to prove title or boundary or right of possession, and incompetent and immaterial generally. Objection is overruled; to which plaintiff excepted.

244 Q. State how you made your survey with reference to the objects pointed out by those men whom you have named.

—. I made them strictly in accordance with those objects, running from the southeast corner of the claim as pointed out as the southeast location corner over a mound of rocks.

Q. Pointed out by whom?

A. Pointed out by John Flaherty, Sandy Devine, Mr. Tyler, and Mr. Smith.

The plaintiff moves to strike out the answer of the witness as incompetent and immaterial, and no evidence of title or location or correct survey. Court rules as follows: He can prove the fact who pointed it out; to which ruling of the court the plaintiff excepted.

A. Over a point—over this mound of rocks I have mentioned to corner number 2, as it appears now on the map.

Q. State whether or not you have made a map of that survey you have just been describing.

A. I have.

Q. Can you point out the points upon that map you have referred to?

A. This point marked the original southeast corner is a point from which I started as being the southeast location corner; thence to this point marked corner one, or that in blue; thence along this black line, as the south line of the Emma lode as surveyed for a patent, over a black spot marked——

Q. What does that indicate now, with reference to your testimony?

A. Marked compromise stake.

Counsel for the plaintiff objected to the above question on the ground that it was immaterial, incompetent to show the boundaries or title or location in any manner; inadmissable on account of its irrelevancy and immateriality. Objection was overruled by the court; to which plaintiff excepted.

A. This spot here represents the monuments of rocks that was pointed out to me; thence——

Q. By those men?

245 A. By those men. Thence still along this black line to the point marked two within the blue ground.

Q. State what was done at point two with reference to these men and what was said by them at the time it was done.

Counsel for the plaintiff objects to the question as incompetent and immaterial. Objection sustained.

Q. You may state what declarations were made to you by Mr. Devine in the presence of Mr. Smith and Mr. Tyler with reference to the monument of rocks of which you have spoken at the time you were making this survey on the ground.

Counsel for the plaintiff objects to the question on the ground that it is incompetent. Objection sustained; to which the defendant excepts.

Q. You may state what declarations were made to you by Mr. Devine in the presence of Mr. Smith and Mr. Tyler, upon the ground, at the time you were making this survey for a patent for the purpose of determining this boundary line with reference to the point marked corner number two of the Emma Lode claim as surveyed by you for a patent at that time.

Counsel for the plaintiff objects to the question as incompetent and immaterial. Objection sustained by the court; to which ruling the defendant excepts.

Q. You may state who was in possession of the Stemwinder Lode claim at the time of which you have been asked, when you were making this survey on the ground.

Counsel for the plaintiff objects to the question as immaterial. Objection sustained. Exception taken by defense.

Q. You may state what you did with reference to determining the location of the south boundary line of the Emma claim upon the ground at the time you were making a survey for that purpose.

Counsel for the plaintiff objects to the question as immaterial and incompetent; and, further, that the witness was not there as the agent for the Stemwinder Company, but in the capacity of making a survey, and that that is no act of location or title. Objection sustained; to which the defendant excepts.

246 COURT: When you made that survey did you make it simply upon the statements made to you by these people without reference to the original marks of location?

A. No.

Q. Were there any marks on that map specifying that as an exact location where you have made your corners? Were there any points marked here according to law, specifying the various corners?

A. No.

Q. And you made these lines simply from what these people told you?

A. Not simply from what they told me; from my own judgment, only so I kept within the original lines. I drew it in there from the statemwnt they made to me of this compromise between them.

247 *Testimony of* DAVE WISEMAN, a witness on the part of the defense, is then called, sworn, and examined, and testified as follows:

Q. State if you know the Emma Lode claim and its whereabouts.

A. Yes.

Q. State if you know the Stemwinder Lode claim and its whereabouts.

A. Yes.

Q. State if at any time you were present when the survey was being made by Mr. Trask of the Emma Lode claim for a patent.

A. I was.

Q. In what capacity were you there?

A. As axeman.

Q. State whether or not you were assisting in making the survey.

A. Yes.

Q. State whether you were present when the south line was surveyed and corners planted.

A. I was.

Q. State who else was present.

A. Mr. Trask, Byron Flaherty, John Flaherty, Mr. Tyler, and Sandy Devine, James Smith, and a young gentleman by the name of Charley; I don't remember his surname.

Q. You may state whether or not you know of a stone monument to which the lines were surveyed in making that survey.

A. Yes; I remember there was too——

Q. You need not tell what was said. I asked you if you knew of the stone monument?

A. Yes.

Q. You have heard Mr. Trask testify in this case?
A. Yes.
Q. State whether or not it was the stone monument to which he referred.
A. Yes; it was the same monument.
Q. State if you heard any conversations or statements made by Sandy Devine in the presence of Smith and Tyler with refer-
248 ence to what that stone monument was placed there for and recognized as being.

Counsel for the plaintiff objects to the question as immaterial, incompetent, and irrelevant; that the evidence is not admissable to prove boundaries or title of a mining claim or a correct survey thereof and not competent as evidence to vest or divest title. Objection sustained by the court.

249 MICHAEL SWEENEY, a witness on the part of the defense, was then called, sworn, and examined, and testified as follows:

Q. Will you just look at this book and state what it is? What is your official capacity?
A. Deputy recorder of Shoshone county.
Q. Are you custodian of those records?
A. Yes.
Q. What are these books?
A. Deed records of Shoshone county.
Q. State what is on page- 118 and 119. What is this?
A. Deed from Michael Flaherty, by his attorney, John King, to Frank R. Moore, conveying a quarter interest in the Emma & Last Chance Lode claims.
COURT: In what book and page?
A. Book N, page 118. Book J, page 131, is a deed from John Flaherty to Michael Flaherty, conveying one-fourth interest in the Emma & Last Chance Lode claims; Book L, page 58, deed from John L. Smith to Louis Goldsmith, conveying one-fourth interest in the Emma & Last Chance Lode claims; Deed Record N, Shoshone County, page 436, deed from Frank R. Moore to the Emma & Last Chance Consolidated Mining Company, conveying one-half interest in the Emma & Last Chance Lode claims; Book N, page 479, deed from Michael Carlin to Frank R. Moore, conveying one-fourth interest in the Emma & Last Chance Lode claims; Book N, page 277, deed from Louis Goldsmith to the Emma & Last Chance Consolidated Mining Company, conveying an undivided one-fourth interest in the Emma & Last Chance Lode claims; Book N, 278, deed from John M. Burke to the Emma & Last Chance Consolidated Mining Company, conveying an undivided one-fourth interest in the Emma & Last Chance Lode claims.

250 JOHN M. BURKE, a witness for the defense, is called, sworn, and examined, and testified as follows:

Q. Are you a citizen of the U. S.?

A. I am.
Q. Were you a citizen of the U. S. on the 17th of September, 1885?
A. Yes.
Q. You were one of the locators of the Emma Lode claim, were you?
A. Yes.

Cross-examination:

Q. Native-born or naturalized?
A. Native-born.

Redirect examination:

JOHN M. BURKE, a witness on the part of the defense, is then called, sworn, and examined, and testifies as follows:

Q. Mr. Burke, you are acquainted with Sandy Devine?
A. Yes.
Q. Acquainted with Stemwinder mining claim?
A. Yes.
Q. State if at any time Devine had any conversation with you upon the ground in controversy between the Stemwinder and the Emma Lode claim with reference to the boundaries.
A. He did.
Q. State how you came to go upon the ground.

Counsel for the plaintiff objects to the question on the ground that it is immaterial.

Q. Was Sandy Devine at the time interested in the Stemwinder mining claim?
A. I went on the ground with parties of the Emma and Stemwinder, both for the purpose of finding out this ground.
Q. Were you interested in the claim at that time?
A. I was.
Q. At the time you went upon the ground?
A. Yes.

251 Q. Will you tell us what was said by Devine in the presence of Tyler and Smith and yourself with reference to the boundary line between the Emma and Stemwinder claim, at that time, upon the ground?

Counsel for the plaintiff objects to the question as incompetent and immaterial and because it is not an act of location or title. Objection sustained by the court; to which the defendant excepts.

252 GEORGE R. TRASK is again recalled by the defense, and testified as follows:

Q. You may state whether or not the stone monument to which you have testified was ever pointed out to you by Michael Carlin.
A. It was.

Counsel for the plaintiff objects to the question because Michael Carlin was one of the locators of the Emma, and because his testimony would be incompetent and immaterial to prove any boundary

or title or location of a mining claim. Objection overruled; to which the plaintiff excepted.

Q. State whether or not the stone monument pointed out to you by Carlin was the one you indicated on that map.
A. It was.
Q. And of which you have testified?
A. Yes.

Cross-examination:

Q. When was it?
A. While I was making the official survey. I think it was the second day of the survey.
COURT: When was that?
A. In December, 1886.
Q. Are you certain Mike Carlin was with you then?
A. Yes.
Q. What day of December do you think this was?
A. I don't remember the day; it was some time in December, 1886.
Q. How many days were you at it?
A. I was on the ground about seven days—six or seven.
Q. This was the second day of the survey?
A. Yes.
Q. That Mike Carlin was there?
A. Yes.

253 MICHAEL CARLIN, a witness for the defense, is again recalled, and testified as follows:

Q. You testified this morning to making a stone monument—you and Mr. Devine building a stone monument; did you ever point out that stone monument to Mr. Trask?
A. I did.
Q. Was that the monument you pointed out to him, the one you referred to when you said you planted a monument 300 feet from the discovery point of the Stemwinder?
A. That is the one—300 feet.
Q. The same place?
A. The same place.
Q. When was this that you pointed it out?
A. The second day of the survey; the first day I did not goz.
Q. What survey do you refer to?
A. The Emma survey. I went and got Devine and two of those other fellows to go and point out the——

Cross-examination:

Q. Were you on the ground when you pointed it out?
A. Yes.
Q. Close to the monument?
A. Close to the monument.
Q. This was the second day of the survey?

A. Second day of the survey.

Q. Are you certain you were there while it was being surveyed for a patent?

A. I was; me and Jim Smith went up there together the second day.

Q. Is it not true that you and Smith went up and came back?

A. We went into the cut and rolled a boulder out.

Q. Is it not a fact that you and Smith started up and came back?

A. It is a fact, I went up there.

Q. While Trask was there?

A. While they were surveying, I went to this cut.

254 MICHAEL SWEENEY is again recalled, and testified as follows:

Witness produces power of attorney from Michael Flaherty to John King, which is a general power of attorney Book B, power of attorney, Shoshone county, which is offered and read in evidence by the defense.

CHARLES SWEENEY, a witness on the part of the defense, is then called and examined, and testified as follows:

Q. Are you acquainted with the Emma Lode claim?

A. Yes.

Q. When did you first become acquainted with it?

A. In April, 1886.

Q. State if you know of any work being done in the year 1886.

A. Yes; three or four hundred dollars' worth of work done on it in the year 1886, or I had it done under my direction.

Q. State if you know of any work being done in the year 1887.

A. Yes.

Q. How much, and when?

A. About three hundred dollars' worth done in 1887—done under my direction.

Q. State if you have any interest in the mining claim.

A. Yes, now; did not have any in 1886, except a bond on it.

Cross-examination:

Q. What part of the map of the Emma, on that map, did you do the work in 1886?

A. About where the point marked discovery is.

Whereupon the defense rests its case.

255 X. S. BURKE, a witness for the plaintiff, is then called, sworn and examined, and testified as follows:

Q. Let me direct your attention to that map at a point marked the Emma discovery. Do you know where that point is with reference to the actual position of the ground?

A. I know it lies upon the ground; I don't know exactly how it is—exactly where it is—represented on that map.

Q. Do you know where the Emma discovery is?
A. I do.
Q. Have you ever surveyed that vein from there?
A. I have made a number of surveys upon the vein.
Q. Can you from your survey you made upon the ground—your observations—do you know where the Stemwinder discovery is?
A. Yes.
Q. Where, about, on that map?
A. I cannot tell where it would be upon that map, exactly.
Q. Do you know where the vein runs from the Emma on the map there?
A. I know very nearly; cannot say exactly.
Q. How wide is the vein there east of the discovery?

Counsel for the defense objects to the question as incompetent and immaterial; which objection is sustained; to which ruling the plaintiff excepted.

Q. Did you ever measure the distance from the Stemwinder discovery to the Emma discovery?
A. Yes.
Q. On the ground?
A. Yes.
Q. How far is it?
A. I will have to testify from memory now.

Counsel for the defense objects unless witness knows.

A. I have it down in a memorandum.
Q. Where is it, in Portland?
A. No; in this town.
Q. Do you remember it?
A. I remember it very closely.
Q. About how far is it?
256 A. In a direct line, it would measure about 280 feet.
Q. From one discovery point to the other?
A. Yes; the distance they would lay apart at a line at right angle to the Bunker Hill or this line of the Stemwinder is about 245 feet.
Q. In either case it is within 300 feet?
A. Yes.

Cross-examination:

Q. Now, Mr. Burke, you say from the point of discovery of the Stemwinder; is that the original point of discovery?
A. It was the original point of discovery as pointed out to me by Mr. Tyler.
Q. By whom?
A. Mr. Tyler.
Q. Do you know whether it is the original point of discovery or not?
A. I do not.
Q. Is it the original point of discovery as indicated on the application for a patent?

A. Of the Stemwinder?
Q. Yes.
A. I don't know what was indicated upon the application for the Stemwinder.
Q. Do you know where the original point of discovery of the Stemwinder is?
A. Yes.
Q. How do you know?
A. By seeing the marks and having it pointed out to me by Mr. Tyler; nothing further than that.
Q. Do you know whether or not that original discovery notice was posted at two different points or not?
A. I don't know; it was not then.
Q. When did you first see it?
A. Either the 6th or 7th of June, 1886; 6th, I think it was.
Q. You don't know whether it had not been moved from its original location at that time?
A. It is impossible that I should know that.
Q. Well, you don't know?
257 A. No.
Q. You don't know whether or not that was the original place Devine posted that notice of discovery?
A. Only Mr. Tyler told me it was the original place.
Q. Did he tell you that?
A. He did.
Q. How did he know? Did he claim to be present?
A. I don't know. I know nothing about it.
Q. Don't you know he was not present?
A. No; I don't know; did not know that he was not interested in the claim at all until two months afterwards.
Q. Didn't Mr. Tyler tell you he posted it there originally?
A. I don't know.
Q. Where was this with reference to the bluff of rocks when you saw it?
A. It was so much nearer to the Bunker Hill lines than it would noturally be placed.
Q. Where was this with reference to the bluff of rocks when you saw it?
A. It was down the hill 80 feet, which would be the east.
Q. From the bluff of rocks 80 feet?
A. Yes. It was south from the bluff of rocks where the principal portion of galena showed, as I recollect, 40 feet.
Q. It was 80 feet from a bluff of rocks?
A. All of that. It was a little bit of a point of rocks, not a big bluff, but a small point. Further up the hill is a big bluff.
Q. This was in June?
A. The 6th or 7th day of June.

Redirect examination:

Q. I will ask you if Mr. Tyler was interested in the claim at that time.

A. I don't know. I suppose he was.

Q. Well, but your answer in response to the question of his was two months after Mr. Tyler pointed this out that you knew anything about it.

A. I know nothing about it. I don't know when he first became acquainted with the claims. I supposed he was an owner.

258 Q. This was in June?

A. The 6th or 7th day of June.

Redirect examination:

Q. I will ask you if Mr. Tyler was interested in the claim at that time.

A. I don't know. I suppose he was.

Q. Well, but your answer in response to the question of his was two months after Mr. Tyler pointed this out that you knew anything about it.

A. I know nothing about it. I don't know when he first became acquainted with the claims. I supposed he was an owner.

Q. This was in June, 1886?

A. Yes.

And now plaintiff rests.

259 Whereupon, the plaintiff and defendants both having rested their case and the arguments of counsel having been made, the court, at the request of the plaintiff, gave to the jury the following instructions, namely:

1.

By the act of Congress which took effect May 10th, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase by citizens of the United States and those who have declared their intention to become such, under the regulations prescribed by law and according to the local customs and rules of miners in the several mining districts, as well as the territorial laws, so far as the latter are applicable and not inconsistent with the laws of the United States.

Both of the locations at bar were made, if at all, subsequent to the passage of that act of Congress; therefore whatever rights either of the parties acquired have been acquired by force of that act of Congress known as the mining law of May 10th, 1872, and the local territorial laws, so far as they are applicable and not inconsistent with the national law.

Under the act of Congress referred to, and under the territorial law also, the locator is authorized to locate a claim not more than 1,500 feet in length along the vein or lode; and it is further provided that no claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulations to less than 25 feet on each side of the middle of the vein at the surface.

These words I quote from the statute itself, and in the absence of

a mining rule or custom in force at the time a location is made, at the place where it is made, the location may extend to the distance of 300 feet on each side of the middle of the vein on the surface—that is to say, the claim may be 1,500 feet in length along the vein by 600 feet in width, including 300 feet on each side of the middle of the vein; and no locator can claim to hold any more
260 than is given to him by reason of the laws to which I have referred. "1,500 feet along the vein" are the words of the statute, and "300 feet on each side of the middle of the vein" seems to limit the amount of land that can be located in any one mining location.

There is no pretense or claim in this case that there was any mining rule or custom in force in the Yreka mining district at the time these locations were made other than the national and territorial laws to which I have referred, and therefore you have no rule or custom established and in force in the district to consider in making up your verdict in this case.

You are further instructed, gentlemen of the jury, that by the act of Congress it is provided that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located; so that you will perceive that no rights can be acquired under the statute by a location made before the discovery of a vein within the limits located.

A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or some kind of rock in place carrying gold, silver, or other valuable mineral deposits named in the statutes, but it is necessary at all events that the locator shall discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery, within the limits of the claim located, in order to entitle the miner to make a valid location to include such vein or lode.

2.

The Government gives its lands to those citizens who may discover precious metal ores therein upon the condition that the locators will define subject to the grant—in other words, the mining location—with such certainty as may be necessary to prevent mistakes on the part of the Government or on the part of other citizens who may be asking a like privilege; that is reasonable and necessary to justly administer the law, and therefore it may be laid down as a general proposition of law that without a description of the premises in the notice of location the location will be void.
261 It is well here for the court to instruct you, first, as to the actual wording of the statute of the United States and the territorial law, both regarding the location of a mining claim, so that there can be no mistake in the minds of the jury as to the mining law or the instructions the court will give you.

Section 2324 of the Revised Statutes of the United States provides, among other things, that the location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily traced, and all records of mining claims hereafter made will contain

the names or name of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.

Supplemental to that act is the act of the territorial legislature of Idaho, section 3101 of the Revised Statutes of Idaho, which provides that the locator of any lode mining claim must at the time of making location place a substantial stake or post, not less than four inches square or diameter, at each end of the ground claimed, and as near as practicable along the course or line of the vein or ledge, and also a similar stake or post at each corner of the location. Such stakes or posts must be at least four feet high above the surface and must each be marked distinctly with the name of the claim, and the notice of location hereinafter mentioned must be conspicuously attached to one of said centre end posts so that the same may be easily read.

Section 3102 of the Revised Statutes of Idaho says: The notice must contain the date of location, the names of the locators, the name of the claim, ledge, or lode, the quantity of feet claimed along the ledge or lode, the width claimed from the middle of the vein, and must also give such a description of the locality of the claim by reference to natural landmarks or fixed objects and contiguous claims, if there be any, as to render the situation of the same reasonably certain from the letter of the notice itself.

It will thus be observed that while the act of Congress of May 10th, 1872, does not make it obligatory to record notices of location the statutes of Idaho does, and therefore is not in conflict
262 with the national law. It must further be borne in mind that the act of Congress above quoted to you provides that if a record at all be made it shall contain a reference to some natural object or permanent monument as will identify the claim. Therefore if the record of a mining claim be made there is no authority or rule of law that can obviate the necessity of such notice referring to some natural object or permanent monument as to identify the claim.

4.

You are further instructed that unless you find that the tract of ground now claimed as the Emma mining claim was marked and defined upon the ground in the first instance as the Emma mining claim that the subsequent survey thereof does not make a valid location thereof.

6.

Marking the boundaries of a surface claim as required by the statute is one of the first steps towards a location. It serves a double purpose. It operates to determine the rights of the claimant as between himself and the General Government and to notify third parties of the locator's rights. Another party, seeking the benefits of the law, going upon the ground is distinctly notified of the appropriation and can ascertain its boundaries. He may thus make his

own location with certainty, knowing the boundaries of the other cannot be changed so as to encroach on ground duly appropriated prior to the change. The prevention of frauds by swinging or floating is one of the purposes thus served. The record also serves a double purpose as between the claimant and the Government: it preserves a memorial of the lands appropriated after monuments in their nature perishable are swept away. It also supplements the surface marking in giving notice to third parties.

13.

When the right of possession to a mining claim is founded upon the alleged compliance with the laws relating to a valid location, all the necessary steps, aside from marking and recording the location notice, must, when contested, be established by proof outside of such notice, the record of the notice being proof in itself of its own performance of one of the steps in the location of a min-
263 ing claim, and in regular order the last step in perfecting the location, and the notice when recorded is competent evidence of what the statute requires such notice to contain and which are therein sufficiently set forth, and even when the notice itself, for any reasons set forth in the statute, is deemed void it has been held admissable in connection with a valid amended location correcting the defects of the original notice.

14.

And unless some intervening right occurred or some pre-existing right of another, it follows that if an amended notice of location, valid of itself, is made to correct the defects of the original location, such additional notice serves the purposes of the original notice and relates back to the first location of the claim, the evident object and intent of the notice being to cure the defects in the original and thereby to put the locator where no other rights have intervened—in the same position that he would have been if no such defect had occurred in the original—and such intent is in perfect accord with the principles of all the provisions of the statutes relating to mining claims.

15.

The real question involved in this action upon adverse claims is, as each against the other, which has a better right to the possession of the mine or to mine the land in question. Each party must prove his claim to the premises in dispute, and the better right must prevail. The right to mineral lands before a patent issues from the Goverment rests in the possession of the claimant; to constitute such possession as will give this right no residence on the premises or continued actual occupation is necessary.

17.

As between two locators, the boundaries of whose respective claims include the common territory, the priority of location confers the better title, provided a vein or mineral in place was discovered at

the discovery shaft, and provided also that it extended to the ground in controversy, and that the location was properly marked and defined upon the ground either by the original location or an amended location and the marking and defining of the boundaries in accordance therewith prior to any other intervening rights.

264 21.

Among other things, the law of Congress provides that "no location of a mining claim shall be made until the discovery of a vein or lode of quartz or other rock in place bearing gold, silver, or other precious metals, within the limits of the claim located;" and upon this question I instruct you that a discovery of a vein or lode within the limits of another mining claim previously located according to law is not such a discovery as the law requires, and if you find that at the time of the location of the Emma mining claim the Stemwinder mining claim had been previously located according to law and was then held under such location, and that the discovery of the Emma claim was within the limits of the said Stemwinder claim, then the said Emma location would be void.

That then and there, upon the trial of said action, the plaintiff presented to the court, among the other instructions, the following, and requested the court, among other things, to give to the jury the following instructions, namely, 1st, being paragraph 3rd of plaintiff's proposed instructions, to wit:

You are therefore instructed that the locator of a mining claim must distinctly mark and define the location upon the ground by proper stakes and monuments, so that the boundaries thereof can be readily traced; and if you find from the evidence that the Emma locators placed stakes at a distance of 2,300 feet apart to define the length of their claim, and that the notice of location does not conform thereto, or, even if it does, that a location made so largely in excess of that allowed by law is of itself void and of no force and effect; and, furthermore, that a subsequent survey of such a claim without a readjustment of the boundaries or without any effort to mark or define the same according to law will not benefit the locators or remedy the defects of the original location. A location of a mining claim made so largely in excess of that allowed by law is not a location in law at all; it is neither the marking or defining of the boundaries of a mining claim, and no record thereof can make the same valid or binding.

265 Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

The plaintiff also requested the court to give the following instructions to the jury, being the 5th paragraph of plaintiff's instructions, namely:

You will furthermore observe that if there is a variance between the ground as staked, the ground as referred to in the notice of location, and the ground actually surveyed for a patent, all this presents a case of such vague uncertainty as to be null and void as against

the Government or any one claiming against the Government by reason of another location valid of itself.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

The plaintiff also requests the court to give the following instruction to jury, being the 7th paragraph of plaintiff's instructions, namely:

Where there is a variation of any considerable extent between the courses and distances of the location notice and the monuments placed upon the ground, the record with its misdescription in point of fact gives no notice of the ground actually located. Therefore you are instructed as a matter of law that if you find that the location notice of the Emma lode does not sufficiently refer to the same ground as actually staked, such notice then is of no force or effect and gives no notice to third parties claiming to locate the same ground.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

The plaintiff also requested the court to give the following instructions to the jury, being paragraph 8th of plaintiff's instructions, namely:

266 A claimant who has not erected his boundary posts as the law requires will not be permitted to show the courses and distances of a recorded location that does not conform thereto, where the rights of intervening locators without notice will be prejudiced.

Which instruction the court refused to give; to which refusal the plaintiff there and then excepted and now assigns as error.

The plaintiff also requested the court to give the following instruction to the jury, being paragraph 9th of plaintiff's instructions, namely:

The law of Congress under which the locations in controversy in this action were made requires that the location must be distinctly marked on the ground, so that its boundaries can be readily traced, and the law of the Territory of Idaho in force at the time of the making of the locations of these respective claims provides "that the locator of any lode mining claim must at the time of making the location place a substantial stake or post not less than four inches square or in diameter at each end of the ground claimed and as near as practicable along the course or line of the vein or ledge, and also a similar stake or post at each corner of the location; such stake or post must be at least four feet high above the surface and must each be marked distinctly with the name of the claim.

I therefore instruct you that if you find from the evidence that in marking the location of the Emma Lode claim upon the ground the locators thereof did not place a substantial stake or post at each end of the ground claimed in the notice of location, and as near as practicable along the course or line of the vein or ledge, and also a similar stake or post at each corner of the location, as described in the notice of location, or within such reasonable distance of such points that the boundaries of such claim could be readily traced upon the ground, then such location would be void.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

267 Plaintiff requested the court to give the following instruction to the jury, being paragraph tenth of plaintiff's instructions, namely:

And if you further find that on the 17th day of September, 1885, the locators of the Stemwinder lode mining claim entered upon the premises claimed as the Stemwinder location and discovered therein a vein or lode of quartz or other rock in place bearing gold, silver, lead, and other valuable minerals and located a claim and claimed the premises described in the complaint as the Stemwinder lode claim by posting in a conspicuous place at the point of discovery and prospecting work on the claim a notice of location containing the date of location, the name of the locators thereof, and the name of the claim, ledge, or lode, and the quantity of feet claimed along the ledge or lode, the width claimed from the middle of the vein, and such a description of the locality of the claim by reference to natural landmarks or fixed objects and contiguous claims, if there were any, as to render the situation reasonably certain from the letter of the notice itself, and by marking the boundaries of said claim in accordance with the law as above stated, and that within fifteen days after such location the above locators of said Stemwinder lode claim filed a copy of said notice in the office of deputy recorder of mining claims of Yreka mining district, and that said locators of said Stemwinder lode claim or their grantees in interest have within each year since said location performed one hundred dollars' worth of work upon said claim, and that the plaintiff has be mesne conveyances succeeded to the title of said locator of said Stemwinder lode mining claim, then you shall find for the plaintiff.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

Plaintiff also requested the court to instruct the jury as follows, being paragraph eleventh of plaintiff's instructions, namely:

268 I further instruct you, gentlemen of the jury, that the law of Congress requiring that the location of a mining claim shall be so marked that the boundaries can be readily traced upon the ground, and the said law of Idaho Territory above stated to you describing what the stakes must be and where they shall be placed, must be substantially complied with to constitute a valid location of a mining claim; that a mining claim under the law cannot exceed 1,500 feet in length along the vein or lode and 300 feet in width on each side of the centre of the vein or lode, and that where a mining claim of 1,500 feet in length and 300 feet in width on each side of the vein or lode is attempted to be located these stakes marking the boundaries must be placed at the points described by law, or near enough thereto so that any person honestly seeking to trace the boundary of such claim might readily find them, and if they are not so placed the location will be void.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

Plaintiff also requested the court to give the following instruc-

tion to the jury, being paragraph 12th of the plaintiff's instructions, namely:

And if you find from the evidence that the boundary stakes marking the east end of the Emma Lode claim were placed at such a distance from where the law required them to be placed that a person seeking to trace the boundaries of said claim upon the ground could not readily have found them, then you cannot find for the defendant.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

The plaintiff requested the court to give the following instruction, being paragraph 16th of the plaintiff's instructions, namely:

Therefore if you find that the plaintiff has established its prior right by a proof of the discovery of its grantor in and to the Stemwinder mining claim, worked and possessed the same in pur-
269 suance of said notice, disclosing mineral in place, posting a notice and marking the surface boundaries and filing the original notice of location, and that thereafter, after the discovery of the course of the vein, the plaintiff or its grantors has ascertained the true strike or course of the vein as located, and that to remedy the defects in the original they have filed their amended location, making the boundaries conform to the course of the vein; and if you further find that the Emma location, under the instructions given you, was void, or that they have never amended their location or marked or defined their ground in pursuance of the calls of the same, then you will find for the plaintiff, and that the plaintiff has the right to the possession of all and singular the premises embraced within the amended location in evidence.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

The plaintiff also requested the court to give the following instruction, being paragraph 18th of plaintiff's instructions, namely:

Under the law as it exists, four things are necessary to be done in order to prove a location:

First. The discovery of a vein or lode of mineral or rock in place bearing valuable metals.

2nd. The posting of a notice at the point of discovery near or at some conspicuous portion on the claim, giving the name of the claim located, the name or names of the locators, the date of the discovery, and a description of the premises located by reference to natural objects or permanent monuments.

3rd. By marking the surface boundaries of the claim located by posts in a manner pointed out by the statute.

4th. Making and recording a location notice containing the name and description of the claim, the name or names of the locators, and the date of the location. In case the claim so located is not properly marked and defined upon the ground, as required by the statute, it is incumbent upon the locator, in order to hold and possess and have the right of possession to such ground, to amend his location notice by an amended notice of location, and properly mark the

location upon the ground so that its boundaries can be readily traced.

A location notice is not a title or a proof of title, nor does it constitute or establish the possessory right in issue and to which it relates. It is purely a creature of the statute. Its functions and purposes are to give the world at large notice of the facts therein set forth, when duly recorded, as one of the steps necessary to constitute a perfected mining location, and an amended or additional location upon the same ground, made with the intent to remedy the defects in the original, and filed according to the statute, is admissable in evidence and serves the same purpose as the original location notice and relates back to the first location of the claim.

The rule in actions such as the one now before you is that the parties must recover upon the strength of their own titles respectively and the one who has shown his compliance with the law.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

The plaintiff further requested the court to give the following instruction, being paragraph 19th of plaintiff's instructions, namely:

A location of a mining claim is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required by the laws of Congress and Idaho Territory, and among the most important of these requirements are the following, viz: The location must be distinctly marked upon the ground so that the boundaries thereof can be readily traced.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

The plaintiff also requested the court to give the following instruction, being paragraph 20th of plaintiff's instructions, namely:

Now, if you find from the evidence that the location of the Emma lode was not so marked upon the ground that the boundaries
271 thereof could be readily traced at the time of the original location thereof, and that the locators thereof or those claiming under them have not since made or attempted to amend such location or to relocate the same, then such location was and is void, and in that case it will be unnecessary for you to inquire as to the priority of the respective locations in controversy herein.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

The plaintiff requested the court to give the following instruction to the jury, being paragraph 22nd of the plaintiff's instructions, namely:

If in marking the location of a mining claim upon the ground the posts or monuments marking the exterior boundaries thereof should be so placed as to include more ground in length than the law allows, such location would be void only as to the excess; but this can only be the rule where stakes or monuments are within such reasonable proximity to the place where the law requires them to be placed that they can be readily found or seen by a person attempting to trace the boundaries upon the ground; but when the stakes or monuments are placed at so great a distance from where

the law requires they should be that a person attempting to trace the boundaries of the claim upon the ground could not readily find them, then such location is void altogether.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

The court, further instructing the jury, at the request of the defendant gave the following instructions, to wit:

1.

The jury are instructed that the right of possession to mining land depends upon a valid location, and if they believe that the plaintiff has failed to prove every act requisite to make a valid location they will find that the plaintiff has no title to the ground claimed as the Stemwinder mining claim.

272 To which instruction and the giving thereof the plaintiff then and there excepted and now assigns as error.

The court, at the request of the defendant, gave the following instruction, being the 2nd instruction requested by defendant, namely:

A locator is not allowed to hold more than 300 feet on each side of the middle of the vein or lode; and if the jury find from the evidence that S. R. Devine included more than 300 feet within his stakes on the northerly side of the point of discovery, at the time the notice was posted and his boundaries marked, his location is void as to the excess over 300 feet, and if such excess was originally included within the boundaries of the Emma location it belonged to the Emma location, provided it appears in evidence that the Emma location was valid.

To which instruction and the giving thereof the plaintiff then and there excepted and now assigns as error.

The court, at the request of the defendant, gave to the jury the following instruction, marked 3rd of defendant's instructions, namely:

If the jury find that the discovery of the Emma mining claim was within such excess they will find that it was not made within the boundaries of the Stemwinder claim.

To which instruction and the giving thereof the plaintiff then and there excepted and now assigns as error.

The court, at the request of the defendant, gave to the jury the following instruction, being instruction marked 5 of defendant's instructions, namely:

If the jury find from the evidence that a location notice claiming the Emma lode was posted upon the claim, after a discovery of rock in place bearing mineral therein, prior to the posting of the notice on the Stemwinder claim, you are then instructed that the claimants of the Emma lode under such notice of location would be protected in the possession of the surface ground claimed in such location notice a reasonable period of time in which to mark the boundaries of the surface ground of their said claim, and that any location made subsequent thereto by the locator of another claim

273 which overlapped the surface of such prior location would be invalid to the extent of the area in conflict; and if you find

that after the posting of the Emma location notice the boundaries thereof were marked by the locators within a reasonable time, and that the Stemwinder location was made after the Emma location, the Emma location would have the prior right.

With the additional instruction in the handwriting of the judge, it is for you to say from the evidence what is a reasonable time.

To which instruction and the giving thereof the plaintiff then and there excepted and now assigns as error.

The court, at the request of the defendant, instructed the jury as follows, namely, being instruction marked 6 of defendant's instructions, namely:

If the jury find from the evidence that the discovery point of the Stemwinder lode was changed a distance of 80 feet or thereabouts and the amended location of the Stemwinder lode adopted the point of discovery as so changed and located at right angles with the course of the location as originally claimed, this would be such a material change of the original location as to amount practically to a relocation, provided it interfered with the rights of any persons who had made a valid location with which such change interfered.

To which instruction and the giving thereof the plaintiff then and there excepted and now assigns as error.

The court, at the request of the defendant, instructed the jury as follows, being instruction marked 7 of defendant's instructions, namely:

The Stemwinder Mining Company is a corporation organized under the laws of the State of Oregon, and no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States.

To which instruction and the giving thereof the plaintiff then and there excepted and now assigns as error.

After the reading to the jury the foregoing written instructions, the court addressed the jury orally, as follows:

274 In addition to what I have read to you, I wish to add a few remarks as to your duty as jurors. You may have ever so much knowledge about mining law and know all about customs and rules and mining rules and regulations, but though you have the wisdom of Solomon they have nothing to do with your deliberations. You are sworn to decide the case on the evidence, and all of your knowledge, however accurate it may be, has nothing to do with this case. You must go according to the law and the evidence in the case. I have stated the law to you very plainly, as it seems to me, as to what constitutes a valid location, and I shall further charge you this: that there really is but one question in this case—the whole case is practically limited to that question—that is, who first made a valid location on this ground? That is really the whole question, stripped of the evidence and stripped of all the facts in the case. That is the point. Now, to determine that point, you must go into all the evidence that you have heard, reconcil- it, if you can, and ascertain, if you can, who, in your judgment, to the best of your belief, first located—made a valid location—upon that ground.

If you find that the plaintiff made the first valid location the

plaintiff is prior in point of time, and whatever may be all the facts in this case—I do not care what they are—the plaintiff is entitled to a verdict at your hands. If you find, however, that the defendant made the first valid location, then the defendant is entitled to a verdict at your hands.

I state that to you so as to simplify the case and bring it down to the direct point in issue. Of course I do not take from you the facts in the case. I do not take from you the evidence that has been given before you; but on those facts you will find a verdict, bearing in your mind your duties as jurors. You have a right in this case to find that neither party is entitled to a verdict; that the property is really in the United States, and if you come to an honest conclusion to that effect you will have to so alter the form of this form of verdict given you as to accord with that conclusion. I now hand you a form of verdict which, when you have agreed, you can fill up and sign.

275 At 3 o'clock p. m., September 29th, the jury having come into court desiring further instructions, the following proceedings took place:

Juror GRAHAM: Your honor, there seems to be some misunderstanding in regard to the instruction of the court in regard to the vital point of the court's instructions.

Juror WEBER: The last two instructions seem to be the only points in issue?

The COURT: Do you mean the ones I gave you from the paper or that I gave you verbally?

Juror WEBER: From the paper and the verbal ones.

Juror SAGE: After we decide as to which was the first location, then this is the point with me: After we have decided as to which was the first location, then are we not to allow no more than 300 feet on each side of the discovery shaft or of the vein? That is the only point with me.

The COURT: The act of Congress says that the locator is entitles to locate a claim of not more than one thousand five hundred feet along the vein or lode, and it is further provided that no claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface. The location may extend to the distance of 300 feet on each side of the middle of the vein at the surface. That is as far as the location may extend—1,500 feet along the claim and 300 feet in width on each side of the middle of the vein; but no locator can claim to hold more than 300 feet in width by reason of the laws to which I have referred. I hardly know what else I can say. That is the plain reading of the statute.

Juror SAGE: Do you mean the middle of the vein or the discovery shaft? That is what I want to be instructed on.

The COURT: The point is this: At the time of the location the measurement must be from the point of discovery—the middle of the point of discovery—unless there is evidence before you that the

vein has actually been established and run. But if the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the
276 point of discovery, and they must be entitled to 300 feet on each side of the middle of the vein at the point of discovery. It must not exceed 300 feet—that is, they are entitled to 300 feet on each side of the vein. I stated to you—at least I will state to you, now you have asked me the question—that is, I stated to you this morning, to the best of my recollection, that the real point at issue in this case is, Who made the first valid location according to law, as I have stated to you, on this ground—on these claims you have heard the evidence about? Whoever made the first valid loc-tion and have the right in point of time, if you find that the location is valid otherwise in every respect, would be entitled to the verdict.

Question by juror. Is that supposed to govern all the other instructions?

A. Oh, no; only in part.

To which instructions by the court and conversations in the presence of the jury the plaintiff excepted then and there and now assigns as error.

And furthermore, while the jury were so in court, the court gave to the jury the following instructions asked for by the defendant, to wit:

Defendant asks the court to limit the application of the verbal instruction to the ground in dispute—understand that—to the ground in dispute between these two mines. The Stemwinder may have the prior valid location; but if it *d9f* not lawfully include ground in dispute, then the instruction as to priority would not apply. You understand that.

To which instruction and the giving thereof the plaintiff then and there excepted and assigns as error.

Whereupon the plaintiff requested the court to instruct the jury, before they retired the second time, as follows:

Plaintiff requested the court to instruct the jury that a locator may locate 300 feet in width on each side of the centre of the vein, and that the question of where the centre of the vein is at the surface is a question of fact for the jury, and in the absence of proof as to where the centre of the vein is, it will be presumed to be at the point of discovery; but if the proof shows that the centre of the vein is at a different point from the discovery, then the locator
277 may hold 300 feet in width on each side of the centre of the vein, as shown by the evidence, if within the boundaries of the claim as marked upon the ground.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

Then and there the plaintiff asked the court to give the jury the further instructions as follows, to wit:

The jury are instructed that if they find that the locator of the Stemwinder located on a vein, and it includes less than 1,500 feet on the vein, and that the vein is found to cross the location, then,

if the location is found to be so made, the locator can take the vein to the limits of his side lines as so located, wherever it runs. 300 feet on each side of the vein means a measurement from the centre of the vein at any point within the location so made until it passes out of the exterior boundaries of the location.

Which instruction the court refused to give; to which refusal the plaintiff then and there excepted and now assigns as error.

278 The foregoing exceptions to the instructions as above stated were taken by the plaintiff, and the same were settled in the bill of exceptions and signed and ordered to be filed and made a record in this cause; and the foregoing instructions are all the instructions given by the court to the jury on said trial, and also all the instructions refused by the court and excepted to by the plaintiff.

That thereupon the jury retired to consider of their verdict, and thereafter, on the same day, to wit, the 29th day of September, 1888, the jury returned into court and rendered the following verdict in this action, to wit:

(Title of Court and Cause.)

We, the jury in the above-entitled cause, find the right of possession to the area of ground in conflict in this action to belong to the defendants.

WILLIAM A. PARKER, *Foreman.*

Endorsed: Filed September 29th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

Whereupon the plaintiff, after excepting to the verdict in open court, moved the court that a stay of proceedings herein be granted for the period of ten (10) days, within which the plaintiff would file and serve its notice of intention to move for a new trial herein; which motion was granted by the court and an order was made staying the proceedings herein accordingly.

Whereupon the plaintiff, on the 4th day of October, 1888, filed in said court and served upon the said defendants and their attorneys the following notice of its intention to set aside and vacate the verdict herein and for a new trial herein; which notice of motion is as follows, to wit:

(Title of Court and Cause.)

Please take notice that the plaintiff, The Stemwinder Mining Company, intends to move the court to set aside and vacate the verdict of the jury heretofore rendered and entered herein and to grant a new trial in this case upon the following grounds, to wit:

1st. Newly discovered evidence material for the plaintiff
279 which it could not with reasonable diligence have discovered and produced at the trial.

2nd. Insufficiency of the evidence to justify the verdict.

3rd. That the verdict is against law.

4th. Errors in law occurring at the trial and excepted to by the plaintiff.

That said motion will be made upon affidavits hereafter to be filed and served upon you, and also upon a statement of the case, to be hereafter prepared and settled and filed herein, and upon the pleadings and records of the court herein.

ALBERT HAGAN & ALBERT ALLEN,
Attorneys for Plaintiff.

Endorsed: Filed October 4th, 1888.

That thereafter, on the 5th day of October, 1888, the court made and entered into the minutes thereof the judgment on the verdict, as follows, to wit:

(Title of Court and Cause.)

This cause came on regularly for trial. The said plaintiff appeared by its attorneys, Albert Hagan and Albert Allen, Esquires, and the defendant by Woods & Heyburn, Esquires, its attorneys. A jury of twelve persons was regularly empannelled and sworn to try the said action; whereupon witnesses on the part of the plaintiff and defendant were sworn and examined, and after hearing the evidence and the arguments of counsel and the instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court with a verdict, signed by the foreman, and, being called, answer to their names and say:

"We, the jury in the above-entitled cause, find the right of possession to the area of ground in conflict in this action to belong to the defendants.

WILLIAM PARKER, *Foreman.*"

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that the said defendant, The Emma & Last Chance Consolidated Mining Company, have the right of possession of the mining ground in controversy between the said plaintiff and defendant and in said complaint de-
280 scribed as follows to wit: Beginning at a point, being corner No. 3 of the official survey of the Emma Lode claim as the same was surveyed and marked upon the ground in the making of the official survey for a United States patent, thence north 82 degrees 23 minutes east 82.4 feet to a point on the north side line of the said Emma Lode claim as surveyed for patent; thence south 71 degrees 50 minutes east 534.9 feet to a point; thence south 11 degrees 58 minutes east 59.6 feet to a point on the south side line of the said Emma Lode claim, said point being south 80 degrees 40 minutes east 612.8 feet from corner No. 2 of said official survey of the Emma Lode claim; thence along the south side line of the Emma Lode claim north 80 degrees 40 minutes west 612.8 feet to corner No. 2 of the official survey of the said Emma Lode claim; thence north 1 degree east 114 feet to the place of beginning, and containing an area of 1.38 acres of land; and that the same be adjudged and decreed to be a part of the said Emma Lode claim as the same is located and claimed by John Flaherty, J. L. Smith, M. Carlin, and John M. Burke on the

17th day of September, 1885, and the right of possession to all of said Emma Lode claim as surveyed for a patent and described in the application for patent belongs to the defendant in this action, and that the defendant have and recover of and from said plaintiff its costs and disbursements in this action, amounting to the sum of — dollars.

JOHN L. LOGAN, *Judge.*

A true copy. Attest my hand and the seal of said district court this 5th day of October, A. D. 1888.

F. H. GRIERSON, *Clerk,*
[SEAL.] By BARRY N. HILLARD, *Deputy.*

Endorsed: Filed October 5th, A. D. 1888.

That thereafter, on the 5th day of October, 1888, the following order was made in this action:

(Title of Court and Cause.)

By agreement of counsel in open court, it is stipulated, and so ordered by the court, that the plaintiff have to include the 20th day of October, 1888, to make, serve, and file its statement on motion for a new trial, its affidavits to be used on motion for new trial, its motion for a new trial and motion for judgment "*non obstante veredicto.*"

281 That defendant have to include November 20th, 1888, to prepare and serve amendments to plaintiff's statements and counter-affidavits.

And it is ordered that execution herein be stayed until the hearing and determination and other disposition of the motion for a new trial herein.

October 5th, 1888.

JOHN L. LOGAN, *Judge.*

A true copy. Attest my hand and the seal of said district court this 5th day of October, A. D. 1888.

F. H. GRIERSON, *Clerk,*
[SEAL.] By BARRY N. HILLARD, *Deputy.*

Endorsed: Filed October 5th, A. D. 1888.

The plaintiff now refers to the bill of exceptions herein, settled by the court, containing all the instructions given and refused in said action by the court and showing the instructions given and refused, to which the plaintiff excepted respectively, and which said bill of exceptions was settled and signed by the judge and thereafter filed in said court on the 5th day of October, 1888, and also the bill of exceptions settled and signed by the judge, containing the exceptions taken during the trial of said cause, and also the pleadings herein and the judgement-roll herein, and makes the same a part and parcel of this statement, to be used therewith on the hearing of the

motion for a new trial and also on appeal herein, if an appeal be had; and the plaintiff, furthermore, now submits the foregoing as his statement on motion for a new trial herein and to vacate and set aside the verdict herein, and to vacate and set aside the judgment made and entered herein; which statement is to be used on the hearing of said motion and also to be used as the statement on appeal herein in case said motion for a new trial herein be overruled and an appeal be taken.

And now comes the said plaintiff The Stemwinder Mining Company and upon the statement and papers and files in said action
282 and upon the affidavits filed herein upon the ground of newly discovered evidence moves the said court to vacate and set aside the verdict of the jury herein rendered and entered and to vacate and set aside the judgment herein entered and that a new trial herein be granted, and specifies the particular errors upon which it relies and will rely in its motion for a new trial herein, to wit:

Specifications.

Particulars in which the evidence is insufficient to sustain or justify the verdict and judgment herein.

1.

The evidence is insufficient to justify the verdict herein and the same should be set aside upon the ground that the evidence shows that the Stemwinder mining claim, including the area in conflict, was located prior to the Emma mining location, and that there was included in said location of the Stemwinder at least 600 feet on and along the vein so located, and that the locators and the owners thereof, to wit, the Stemwinder mine, were entitled to 300 feet on each side of the centre of the vein so located, which would include the area in conflict.

2nd.

That the plaintiff, by reason of its amended location, was the legal owner of said ground and premises in conflict, as shown from the evidence, and of 600 feet of the Stemwinder mining claim and lode, as originally marked and defined upon the ground.

3rd.

That the evidence shows that the plaintiff is the owner of all the right, title, and interest of the original locator by reason of the location of Devine as well as by reason of the amended location of the Stemwinder Mining Company, and as such owner entitled to the possession and to the right of possession of all the area in conflict, as shown from the evidence.

4th.

That the notice of location of the Emma mining claim was insufficient and is void by reason of the same being vague, uncertain,
and containing no sufficient description of the ground located,
283 and that the record of the notice of location thereof was insufficient and void and contained no description of the ground located with reference to natural landmarks or fixed objects or contiguous claims, so as to render the situation of the location reasonably certain from the notice itself, and that said notice so recorded and offered in evidence does not contain such a description of the claim located by reference to natural objects or permanent monuments as to identify it, and that the said location had never been marked or defined upon the ground so that its boundaries could be or can be readily traced.

5th.

That the evidence showed that the Emma mining claim had never at any time been marked or defined upon the ground, as called for in the notice of location, so that its boundaries could be traced in any manner, and that the marking thereof was largely in excess of that allowed by law and therefore void and of no force and effect.

6th.

That the e-idence showed that the location notice and the point of discovery claimed as the Emma discovery was made within the limits of the S-emwinder mining claim, which latter claim was at the time of the location of the Emma occupied and had been located as a mining claim prior to the location of the Emma, and that no adverse claim could be initiated under such pretended Emma location under such circumstances.

7th.

That the Emma location is shown from the evidence to have been made upon a vein already actually occupied for mining purposes as the Stemwinder mining claim, and the location thereof was void and could convey no right or title to the possession upon which a claim for mineral patent could be based.

8th.

That the Emma was located across the vein located and within the limits of another existing mining claim, to wit, the Stemwinder.

9th.

That it appears from the evidence that the location of the Emma was within the boundaries of the Stemwinder mining claim, already
existing at the time of the location of the Emma mining
284 claim, and that no subsequent discovery or location or of the marking of the boundaries of the Emma mining claim has

ever been had or made by the locators or owners thereof and the same was therefore void and the defendants were not entitled to a patent therefor.

10th.

That the evidence showed that the Stemwinder mining claim had been located for at least the distance of 600 feet on and along the vein, including the area in conflict herein, and was a legal subsisting and existing location prior to the location of the Emma mining claim.

11th.

That the evidence in this case shows that The Stemwinder Mining Company, the plaintiff herein, after the purchase of the Stemwinder mining claim from the owners thereof, went into possession thereof, and filed its amended notice of location for record and posted the same upon the mining claim so located, and by such amended location marked and defined the boundaries of the Stemwinder mining claim as amended on and along the said Stemwinder vein within the exterior limits of the original location thereof, including the area in conflict herein, and thereby became not only the owner of the said premises by reason of such amended location, but also became entitled to a patent from the Government, and is and was the only valid claimant thereto showing any valid location thereof or thereon.

12th.

That the evidence shows that no valid location of the Emma mining claim has ever been made at any time by the locators or the defendants, and that, being in excess of that allowed by law and the said Emma mine having been located within the boundaries of the Stemwinder mining claim, the same was void and the defendants are not entitled to a patent therefor and the right of possession thereto, including the area in conflict, as against the plaintiff.

13th.

That it appears from the evidence that the notice of location, if ever posted upon the Emma mining claim by its locators, was never recorded as required by law.

14th.

285 That there is no evidence of the citizenship of the defendants herein, and that there is no evidence that the stockholders of the Emma & Last Chance Consolidated Mining Company or four-fifths ($\frac{4}{5}$) thereof or the owners of four-fifths ($\frac{4}{5}$) of the stock thereof were at the time of the trial of the said action, or ever were, citizens of the United States; and that therefore, for the foregoing reasons, the evidence herein is insufficient to justify the said verdict, and for the same reasons the said verdict is against law.

And plaintiff specifies the following errors at law, occurring at the trial and excepted to by the plaintiff, upon which it will rely, among other things, in its motion for a new trial and motion to set aside and vacate the verdict and also the judgmen therein, to wit:

15th.

The court erred in refusing to give the instruction asked for by the plaintiff herein which is marked "No. 1, refused," and the plaintiff now assigns such action of the court as error.

16th.

The court erred in refusing the instruction marked "No. 2, refused," which was requested to be given upon the part of the plaintiff, being the fifth paragraph of plaintiff's instructions, and to which refusal the plaintiff excepted and now excepts and assigns such action of the court as error.

17th.

The court erred in refusing to give the instruction proposed by the plaintiff, being the 7th paragraph of plaintiff's instructions and marked herein "No. 3, refused;" to which refusal to give such instruction the plaintiff then excepted and now excepts and assigns such action of the court as error.

18th.

The court erred in refusing to give instruction, being paragraph eight of plaintiff's instructions, and requested by the plaintiff, and marked herein "No. 4, refused;" to which refusal to give such instruction the plaintiff then excepted and now excepts and now assigns as error.

19th.

The court erred in refusing to give the instruction, being
286 paragraph 9 of plaintiff's instructions and marked herein "No. 5, refused;" to which refusal of the court the plaintiff then excepted and now excepts and assigns such action of the court as error.

20th.

The court erred in refusing to give the instruction requested by the plaintiff, being paragraph 10 of plaintiff's instructions and marked herein "No. 6, refused;" to which refusal the plaintiff then excepted and now excepts and assigns such action of the court as error.

21st.

The court erred in refusing to give the 11th paragraph of plaintiff's instructions, as requested by plaintiff and marked herein as "No. 7, refused;" to which refusal the plaintiff then excepted and now excepts and assigns such action of the court as error.

22nd.

The court erred in refusing to give the instruction requested by the plaintiff, being paragraph 12 of plaintiff's instructions and marked herein "No. 8, refused;" to which refusal the plaintiff then excepted and now excepts and assigns such action of the court as error.

23rd.

The court erred in refusing to give the instruction requested by the plaintiff, being paragraph 16th of plaintiff's instructions and marked herein "No. 9, refused;" to which refusal the plaintiff then excepted and now excepts and assigns the same as error.

24th.

The court erred in refusing to give the instruction requested by the plaintiff, being paragraph 18 of plaintiff's instructions and marked herein "No. 10, refused;" to which refusal the plaintiff then excepted and now excepts and assigns such action of the court as error.

25th.

The court erred in refusing to give the instruction requested by the plaintiff, being paragraph 19 of plaintiff's instructions and marked herein "No. 11, refused;" to which refusal the plaintiff then excepted and now excepts and assigns such action of the court as error.

26th.

287 The court erred in refusing to give the instruction requested by the plaintiff, being paragraph 20 of plaintiff's instructions and marked herein "No. 12, refused; to which refusal the plaintiff then excepted and now excepts and assigns such action of the court as error.

27th.

The court erred in refusing to give the instruction requested by the plaintiff, being paragraph 22 of plaintiff's instructions and marked herein "No. 13, refused;" to which refusal the plaintiff excepted and now excepts and assigns such action of the court as error.

28th.

The court erred in giving the instruction, at the request of the defendant, which is herein marked "No. 1, defendant's instructions;" to the giving of which the plaintiff then excepted and now excepts and assigns the giving of the same as error.

29th.

The court erred in giving the instruction, at the request of the defendant, herein marked "No. 2, defendant's instructions;" to which action of the court the plaintiff then and there excepted and now excepts and assigns such action of the court as error.

30th.

The court erred in giving, at the request of the defendant, the instruction marked "No. 3, defendant's instructions;" to which instruction and the giving of which the plaintiff then excepted and now excepts and assigns such action of the court as error.

31st.

The court erred in giving, at the request of the defendant, the instruction marked "No. 5, defendant's instructions;" to which instruction and the giving of which the plaintiff then excepted and now excepts and assigns the action of the court as error.

32nd.

The court erred in giving the instruction marked "No. 6, defendant's instructions," at the request of the defendant; to the giving of which the plaintiff then and there excepted and now excepts and assigns the giving of the same as error.

288

33rd.

The court erred in giving the instruction asked for by the defendant, marked "No. 7, defendant's instructions;" to the giving of which the plaintiff then and there excepted and now excepts and assigns such action of the court in giving the same as error.

34th.

The court erred in response to the question propounded by juror Sage when the jury had returned into court:

Do you mean the middle of the vein or discovery shaft? That is what I want to be instructed on.

And the court said:

At the time of the location the measurements must be from the point of discovery—the middle of the point of discovery.

And furthermore in response said:

But if the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery, and they must be entitled to 300 feet on each side of the middle of the vein at the point of discovery. It must not exceed 300 feet.

To which instruction of the court and response of the court the plaintiff excepted and now excepts and assigns the same as erroneous and as error.

35th.

The court erred in its oral instruction to the jury when, after telling the jury that whoever made the first valid location would be entitled to a verdict, and, furthermore, on being asked by a juror, Is that supposed to govern all other instructions? the court responded, Oh, no, only in part; to which action and response of the court the plaintiff then and there excepted and now excepts and assigns the same as erroneous and as error.

289

36th.

The court erred in its instruction to the jury when they came into the court for further instructions and the conversations in the presence of the jury, as set forth in the above statement; to which instructions and conversations the plaintiff then and there excepted and now excepts and now assigns the same as erroneous and as error.

37th.

The court erred when, in the presence of the jury upon their return into court, it instructed the jury as follows:

Defendants ask the court to limit the application of verbal instruction to the ground in dispute. You understand that—to the ground in dispute between these two mines. The Stemwinder may have the prior valid location, but if it did not lawfully include ground in dispute, then the instruction as to priority would not apply. You understand that.

To the giving of which instruction the plaintiff then and there excepted and now excepts and now assigns the giving of the same by the court as erroneous and as error.

38th.

The court erred, when the jury was in court for further instructions, in refusing to give the instruction requested by the plaintiff, which instruction is marked herein "No. 14, refused;" to which refusal the plaintiff then and there excepted and now excepts and assigns the action of the court as error.

39th.

The court erred in refusing to give the instruction marked "No. 15, refused," when the jury was in the court the second time and said instruction being requested by plaintiff; to which refusal the plaintiff then and there excepted and now excepts and assigns such action of the court as error.

290 40th.

The court erred in refusing to give the instruction asked for by plaintiff, "that the locator of a mining claim must distinctly mark and define the location upon the ground by proper stakes and monuments, so that the boundaries thereof can be readily traced, and that if the Emma locators placed stakes at a distance of 2,300 feet apart to define the length of their claim, and that the notice of location does not conform thereto, *and* that a location made so largely in excess of that allowed by law is of itself void and of no force or effect;" which instruction the court refused to give; to which refusal the plaintiff excepted.

41st.

And also the court erred in the same instruction by refusing to instruct the jury "that a subsequent survey of such claim, without a readjustment of the boundaries and without any effort to mark or define the same according to law, will not benefit the locators or remedy the defects of the original location.

42nd.

And also the court erred in refusing to instruct the jury in said instruction "that a location of a mining claim made so largely in excess of that allowed by law is not a location in law at all, and that the same was not marking or defining the boundaries of a mining claim as required by law.

Which instruction is known as No. 1, offered by the plaintiff and marked "refused;" to which ruling of the court the plaintiff excepted.

43rd.

The court erred in refusing to instruct the jury as requested in No. *a*, of the instructions "refused" as proposed by plaintiff, in which the court was asked to instruct the jury that "if there is a variance between the ground as staked, the ground as referred to in the notice of location, and the ground actually surveyed for a patent, that all this presents a case of such vague uncertainty as to be null and void as against the Government or any one claiming under the Government by reason of another location valid of itself."

44th.

291 The court erred in refusing to instruct the jury as requested by the plaintiff, "that a claimant who has not erected his boundary posts as the law requires will not be permitted to show the courses and distances of a recorded location that does not conform thereto, where the rights of intervening locators without notice will be prejudiced."

45th.

The court erred in refusing to instruct the jury, as asked for by plaintiff, that "if they find from the evidence that in marking the location of the Emma Lode claim upon the ground the locators thereof failed to place a substantial post or stake at each end of the ground claimed in the notice of location and as near as practicable along the course or line of the vein, and also a similar stake in each corner of the location as described in the notice, or within such reasonable distance of such points so that the boundaries thereof could be readily traced upon the ground, then such location would be void."

46th.

The court erred in refusing to instruct the jury that if they found that the locator of the Stemwinder mining claim located the same on the 17th of September, 1885, after the discovery of a vein therein, and located the same according to law, and marked and defined the same upon the ground as required by law, and recorded such notice of location, and that such locator and his grantees, including the plaintiff, had done all the assessment work each year as required by law, and that the plaintiff had succeeded to all the title of the locators in said Stemwinder claim, that they should find for the plaintiff; which instruction was asked for by the plaintiff and the court refused to give the same.

47th.

The court erred in refusing to instruct the jury, as asked for by plaintiff, "that a mining claim under the law cannot exceed 1,500 feet in length along the vein or lode and 300 feet in width on each side of the vein or lode, and the stakes marking the boundaries thereof must be placed at the points described by law, or near enough thereto that any person honestly seeking to trace the boundaries of such claim might readily find them, and if they were not so placed the location was void;" which instruction was asked for by the plaintiff and refused by the court.

48th.

292 The court erred in refusing the instruction asked for by plaintiff, "that if the jury find from the evidence that the boundary stakes marking the east end of the Emma claim

were placed at such a distance from where the law required them to be placed that a person seeking to trace the boundaries of said claim could not readily have found the same, that they could not find for the defendant."

49th.

The court erred in refusing to instruct the jury, as asked for by plaintiff, "that if they find from the evidence that the plaintiff had established its prior right by a proof of the discovery of its grantor in and to the Stemwinder mining claim, worked and possessed the same in pursuance of said notice of location, disclosing mineral in place, posting a notice and marking the surface boundaries, and filing the original notice of location, and that thereafter, after the discovery of the course of the vein, the plaintiff and its grantors had ascertained the true strike and course of the vein as located, and had filed an amended location thereof in order to conform the same to the course of the vein; and that if they further find that the Emma location was void; that they never amended their location or marked or defined the ground in the said Emma location in pursuance of the calls of the notice of the same, that they should find for the plaintiff;" which instruction was requested by the plaintiff and which request the court refused.

50th

The court erred in refusing to instruct the jury "that in order to make a valid location and to prove the same that a discovery of a vein or lode of mineral must first be made and the posting of a notice at the point of discovery or near the same in some conspicuous place, containing the names of the locators, the date of the discovery, the description of the premises located by reference to natural objects and permanent monuments, and that by marking the surface boundaries of the claim located by posts in a manner pointed out by statute, and recording such notice of location, that the same was all necessary to make a valid location."

51st.

And the court further erred in refusing to instruct the jury "that a claim so located should be properly marked and defined on the ground, as required by the statute, and that it is incumbent upon the locator, in order to hold and possess and have the right of possession to such ground, to amend his location by an amended notice
293 thereof, and to properly mark the location upon the ground so that its boundaries could be readily traced."

52nd.

And the court further erred in refusing to instruct the jury "that a location notice was not a title or a proof of title, nor does it constitute or establish the possessory right in issue and to which it re-

lates, and that the same was purely a creature of the statute, and that its functions and purposes were to give the world at large notice of the facts therein set forth when duly recorded as one of the steps to constitute a perfected mining location."

53rd.

And the court erred in further refusing to instruct the jury "that an amended or additional notice of location upon the same ground, made with intent to remedy the defects in the original and filed according to the statute, was admissable in evidence and served the same purpose as the original location notice and relates back to the first location of the claim."

54th.

The court erred in further refusing to instruct the jury "that the rule in actions which is the case at bar was that the parties must recover upon the strength of their own titles respectively, and that the one who has shown his compliance with the law was the one to recover."

55th.

The court further erred in refusing to instruct the jury "that where the stakes and monuments of a mining claim marking and defining the same are placed at so great a distance from where the law required them to be placed that a person attempting to trace the boundaries of the claim upon the ground could not readily find them, then this location was void."

56th.

The court erred in instructing the jury, as requested by the defendant, "that the right of possession to a mining claim depends upon a valid location, and that if they believe that the plaintiff has failed to prove every act required to make a valid location, that they will find that the plaintiff had no right to the ground claimed as the Stemwinder mining claim."

57th.

The court erred in instructing the jury "that if they found from the evidence that S. R. Devine included more than 300 feet within his stakes on the northerly side of the point of discovery of
294 the Stemwinder mining claim at the time the notice was posted, that his location was void as to the excess, and that if such excess was originally included within the boundaries of the Emma location it belonged to the Emma location."

58th.

And the court further erred in instructing the jury, as requested by the defendant, "that if they found that the discovery of the Emma mining claim was within such excess they would find that it was not within the boundaries of the Stemwinder claim."

59th.

The court further erred in instructing the jury "that if they found that after the posting of the Emma location notice the boundaries thereof were marked by the locators within a reasonable time, and that the Stemwinder location was made after the Emma location, that the Emma location would have the prior right."

60th.

And the court further erred in telling the jury that it was for them to say from the evidence what was a reasonable time.

61st.

And the court further erred in instructing the jury "that if they found from the evidence that the discovery point of the Stemwinder lode was changed a distance of eighty (80) feet or thereabouts and the amended location of the Stemwinder adopted the point of discovery as so changed and located at right angles to the course of the location, as originally claimed, that this would be such a material change of the original location as to amount practically to a relocation."

62nd.

The court erred in instructing the jury, at the request of the defendant, "that the Stemwinder Mining Company is a corporation organized under the laws of the State of Oregon, and no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States."

63rd.

The court erred when, in response to the following question by Juror Sage: "Do you mean the middle of the vein or the discovery shaft? That is what I want to be instructed upon;" to which the court responded and instructed the jury as follows: "At the time of the location the measurement must be from the point of dis-
295 covery—the middle of the point of discovery." And the court further erred in instructing the jury, in response to said question of Juror Sage, in the presence of the jury, in saying to them, "But if the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery, and they must be

entitled to 300 feet on each side of the middle of the vein at the point of discovery."

64th.

The court erred in instructing the jury "that the real point at issue in this case was, who made the first valid location according to law, and that whoever made the first valid location had the right in point of time and was entitled to a verdict;" and in further instructing the jury that that instruction did not govern all his other instructions, but only in part.

65th.

And the court further erred in saying to the jury and instructing them "that the Stemwinder may have the prior valid location; but if it did not lawfully include ground in dispute, then the instructions as to priority of location would not apply."

66th.

The court erred in refusing to instruct the jury, upon its second return into court, that a locator may locate 300 feet in width on each side of the centre of the vein, and the question as to where the centre of the vein is at the surface is a question of fact for the jury, and in the absence of proof as to where the centre of the vein is that it would be at the point of discovery;" "but that if the proof showed the centre of the vein at a different point from the discovery that the locator would hold 300 feet in width on each side of the centre of the vein, as shown in the evidence, within the boundaries of the claim as originally marked upon the ground.

67th.

The court erred in refusing to instruct the jury "that if they found that the locator of the Stemwinder located upon the vein, and the the location included less than 1,500 feet on the vein, and the vein was found to cross the location, then, if the location is found to be so made, the locator could take the vein to the limits of his side lines as so located, wherever it runs, and that 300 feet on each
296 side of the vein means a measurement from the centre of the vein from any point within the location so made until it passes out of the exterior boundaries of the location."

68th.

The court erred in sustaining the objection of the defendant to the question asked the witness Reese Price, "Did he (Devine) point out to you any notice on the claim (the Stemwinder claim) or anything else?" to which action of the court in sustaining the objection thereto the plaintiff then and there excepted and now assigns as error.

69th.

The court erred in sustaining the objection of the defendant to the following other questions asked the witness Reese Price, to wit: "What name did it (the notice) contain?" to which ruling of the court sustaining the objection thereto the plaintiff then and there excepted and now assigns as error.

70th.

The court erred in sustaining the objection to the question asked John King, a witness upon the stand, while testifying about reading the notice of location on the Stemwinder mining claim in September, 1885, as follows, to wit: "Now, I will ask you what name you saw appended to the notice you saw upon that stake?" to which order sustaining defendant's objection plaintiff then and there excepted and now assigns as error.

71st.

The court erred in sustaining the objection of the defendant to the question asked John King, "What did the notice (meaning the Stemwinder notice) purport to be?" and the further question, "What name of a mine was in that notice, and what was the date?" and further, "What name was attached to that notice?" to all of which questions the court sustained the objection of defendant, and the plaintiff then and there excepted and now assigns such action of the court as error.

72nd.

The court erred in sustaining the objection to the question asked the witness George B. McAulay, after the witness had identified a notice as being in S. R. Devine's handwriting; which question is as follows: "Did you ever see a duplicate or copy of this notice on the claim?" The court sustained defendant's objection thereto;
297 to which plaintiff then and there excepted and now assigns such action of the court as error.

73rd.

The court erred in striking out the answer of the witness George B. McAulay when on the stand, which was in response to the following question: "Which notice did you refer to, that I have handed you? Answer of the witness: This is a copy of the amended notice of the Stemwinder;" which answer was ordered to be stricken out on motion of the defendant; which motion was sustained, plaintiff excepting, and now assigns such action of the court as error.

74th.

The court erred in sustaining the objection of the defendant to the following question asked Van B. De Lashmut, a witness upon the part of the plaintiff, to wit: "How many shares of the capital stock

of that corporation do you own?" and the plaintiff then and there excepted to the ruling of the court and now assigns such action as error.

75th.

And the court erred in striking out the answer of the witness Van B. De Lashmut after he had testified that he knew all the stockholders of the Stemwinder Mining Company, and was asked this question, "Are they (the stockholders) citizens of the United States?" whereupon the witness answered, "Yes;" which answer, on motion of the defendant, was stricken out by the court; which action and ruling of the court the plaintiff now assigns as error.

76th.

The court erred in not allowing the plaintiff to prove that the stock of the Stemwinder Mining Company was owned by citizens of the United States, as required by section 2 of an act of Congress known as the alien land law.

77th.

The court erred when John King, a witness on the part of the plaintiff, was on the stand and had testified that he had seen two different notices upon the Stemwinder mining claim, and was asked this question, "What difference was there in that notice you read and the notice you saw a few days afterwards written on this stake?" to which question the objection of the defendant was sustained; plaintiff then and there excepted and now assigns such ruling of the court as error.

78th.

And the court further erred in sustaining the objection of
298 the defendant to the following question asked the witness John King, when upon the stand, concerning said notice, to wit: "Whose name purported to be signed to it (the notice)?" to which ruling of the court sustaining the objection of the defendant thereto the plaintiff then and there excepted and now assigns such ruling of the court as error.

79th.

The court erred in sustaining the objection of the defendant to the further question asked the witness John King, to wit: "Do you know of any attempt on the part of Mr. Devine (the locator of the Stemwinder) to keep away or avoid giving testimony in this case?" to which ruling of the court sustaining the objection thereto the plaintiff then and there excepted and now assigns such ruling as error.

80th.

The court erred in overruling the objection of plaintiff to the question asked the witness George Trask, "Why did you select this particular place (indicating on the map) as the southwest corner of the official survey for a patent?" which objection thereto on the part of the plaintiff being overruled by the court, the plaintiff excepted to such ruling and now assigns the same as error.

81st.

The court erred in allowing the witness George Trask to testify concerning any compromise line or point between the Stemwinder and the Emma mining claim or as to any conversations about the same or any admissions upon the part of Sandy Devine or any of the owners or locators of the Stemwinder mining claim.

82nd.

The court erred in admitting in testimony, when the witness Trask was on the stand and in response to questions asked the said witness, if he had with him a copy of the location notice of the Emma Lode mining claim when he made the survey of the claim for a patent; and the court further erred when he directed the counsel for the defense to ask the witness if he had what purported to be the notice of location of the Emma mining claim with him.

83rd.

The court erred in permitting the witness Michael Carlin to testify that he nailed up a location notice of the Emma mining claim, when the witness said he never read it or knew the contents of it; and furthermore the court erred in allowing the witness to state what the notice was that he nailed up and of what claim the notice was a notice of location *of*.

299 84th.

The court erred in admitting in evidence the answer to the following question asked the witness Michael Carlin, to wit: "Did you ever assist in measuring from a notice that was posted on that claim, the Stemwinder, to ascertain the width of a claim for fixing any point?" which question was objected to by the plaintiff; the objection overruled by the court; the plaintiff excepted and now assigns as error.

85th.

The court further erred in allowing the same witness to answer the following question and in overruling the objection of the plaintiff thereto: "Did you ever have any controversy as to where the true line between the Emma Lode claim as you have described it

as located and where the Stemwinder was?" to which the plaintiff objected; the objection thereto was overruled by the court; the plaintiff excepted and now assigns as error.

86th.

The court further erred in allowing the witness Mike Carlin to testify or give evidence in regard to any compromise line as measured, or of his measuring any point on the Stemwinder to another point on the alleged Emma mining claim, or testifying in any manner that the locators of the Emma had any controversy with Devine and Jim Smith, the supposed locators of the Stemwinder mining claim; that the controversy had been settled in any manner; or allowing the said witness to testify anything about what he (the witness) and the said Devine and Smith or any one did toward settling the controversy, or any controversy, as to the lines of the Emma and Stemwinder mining claims; to all of which testimony, when offered, the plaintiff objected; which objection thereto was overruled, the testimony admitted; to which the plaintiff then excepted and now excepts and assigns as error.

87th.

The court erred in allowing the witness J. L. Smith to testify as to where Harry Hall, who wrote the recorded notice of the Emma mining claim, got the information from which he wrote such notice; and further erred in allowing the said witness Smith to state whether the notice so written by the said Hall contained in substance all that the notice contained that was on the claim. The court further erred in admitting any evidence of the recorded notice of the
300 location of the Emma Lode mining claim, as it was a copy of a copy, and Mr. Hall never copied the notice that was posted upon the claim.

88th.

The court erred in admitting in testimony and having read to the jury the notice of location of the Emma Lode mining claim as recorded, for the reason that such notice does not contain such a description of the premises sought to be located by reference to natural objects or permanent monuments as to identify the claim, and that the same is void for uncertainty, vague, and indefinite and does not conform to the description of the ground as it was staked out, and does not conform to the requirements of the mining laws, either national or territorial.

89th.

The court erred in allowing the witness J. L. Smith to testify as to the contents of the notice posted on the Emma mining claim by himself or Flaherty or Carlin or any of the locators; and also the court erred in allowing in evidence the following question asked the

witness J. L. Smith, who had testified to the notice having been put upon the Emma; was asked this question: "Had the Stemwinder been located at the time you wrote this notice, the original Emma notice?" which question the court allowed to be answered by the witness, and the plaintiff now assigns such ruling of the court as error.

90th.

The court erred in overruling the objection of the plaintiff to the following question asked the witness Michael Carlin after he had testified that Sandy Devine had pointed out to him his notice on the Stemwinder, as follows, to wit: "Did you ever measure a distance from that point of discovery where the notice was posted in a direction practically at right angles with the claim as it was claimed at that time?"

The objection of the plaintiff thereto being overruled, the plaintiff excepted and now excepts and assigns such ruling of the court as error.

91st.

The court erred in allowing the witness Mike Carlin to testify as to the measurements made by the witness and others from such point where the location notice of the Stemwinder was posted to a distance of 300 feet or any other number of feet from the discovery point of the Stemwinder. The court further erred in allowing the following question to be asked the witness M. Carlin and to be answered by him, as follows: "Did you mark or place any monument to mark the point at which 300 feet came from the discovery of the Stemwinder?" The objection of the plaintiff to the same being overruled by the court, the plaintiff excepted and now excepts and assigns such ruling of the court as error.

301

92nd.

The court further erred in allowing the said witness Mike Carlin to give a description of any monument erected at any point 300 feet or otherwise from the said point where he measured on the Stemwinder, or to give any evidence in relation thereto, and the court erred in overruling the plaintiff's motion to strike out any and all testimony of the witness Michael Carlin about measuring from a point on the Stemwinder mining claim 300 feet north at right angles with the claim, or at all, from the Stemwinder discovery *discovery*, or erecting any monument at any point to indicate the south line of the Emma or compromise line, or in allowing the said witness to testify that such measurement and such erecting such monument was done at all, or the number of times it was done by any person or or persons, or as to who was present, or that Devine was present when the same was done.

93rd.

The court erred in refusing to strike out, on motion of the plaintiff, all the testimony of the witness Carlin about his erecting any monument or two monuments of rock to mark the point 300 feet north from the discovery of the Stemwinder.

94th.

The court further erred in saying, during the examination of said witness, "Go on and state about the monument," referring to the monument erected by the witness on the south side line of the Emma as surveyed for a patent.

95th.

And the court further erred in asking or allowing to be asked of the said witness Carlin if this monument was built in the presence of S. R. Devine or that he (Devine) helped to build the same, and erred in allowing the following question to be asked and answered by said witness, to wit: "State if it (the monument) was built in the presence of Sandy Devine;" to which question plaintiff objected; the objection was overruled and the witness allowed to answer the same; which ruling of the court the plaintiff now assigns as error.

302 96th.

And the court further erred in allowing the further question to be asked the witness Michael Carlin, "Did you point out this monument in the presence of Sandy Devine at any time?" to which plaintiff objected; the objection was overruled by the court; to which the plaintiff then and there excepted and the witness was allowed to answer the same, and the plaintiff now assigns such ruling of the court as error.

97th.

The court erred in allowing the witness Michael Carlin to state what he and Devine or any one did in measuring the line now known as the south line of the Emma or placing any monument or mark thereon.

98th.

The court erred in allowing the following question to be asked the witness Carlin and answered by him, to wit: "Do you know about any change being made in the position of the discovery post or notice of the Stemwinder after the location of the Emma lode? State what you know about it." To which question the plaintiff objected; the objection was overruled; to which ruling of the court the plaintiff then and there excepted and now excepts and assigns such action of the court as error.

99th.

The court erred in allowing the witness George Trask to testify as to who were present on the ground when the survey was made for a patent for the Emma mining claim, and in allowing said witness to testify that Sandy Devine, the original locator of the Stemwinder, and Tyler, one of the owners therein, were present.

100th.

And the court further erred in allowing the same witness, after testifying that objects were pointed out to him by certain parties to which to make his survey, and, further, after testifying that Tyler and Devine and those interested in the Stemwinder were present, to be asked and to answer the following question, to wit: "State how you made your survey with reference to the objects they pointed out." Which question was objected to by the plaintiff, and the objection was overruled by the court and the witness allowed to answer the same; to which ruling of the court the plaintiff then and there excepted and now excepts and assigns as error.

101st.

303 The court further erred in allowing the said witness Trask, after testifying that he made the survey in strict accordance with the objects pointed out by Flaherty, Devine, Tyler, and Smith as the southeast corner over a mound of rocks, to further testify as to who pointed out the mound of rocks and objects by which he ran the south line of the Emma; to which testimony the plaintiff objected at the time and the court overruled the objection of the plaintiff thereto and allowed the witness to testify to the same, and the plaintiff now assigns the said action of the court as error; and, further, the court erred in allowing the following question to be asked and answered by the witness: "Can you point out the points upon the map you have referred — ?" And the court allowed the witness Trask, against the objection of the plaintiff thereto, to point out on the map the black spot marked compromise stake, and to answer the said question; to all of which the plaintiff objected; the court overruled the objection, and the plaintiff then and there excepted and now excepts and assigns such action of the court as error.

102nd.

The court erred in allowing the said witness Trask to be asked and to answer the following question: "What does that (the black spot marked on the map) indicate now with reference to your testimony?" Ans. "Compromise stake." To which question and answer the plaintiff then and there excepted and now excepts and assigns such action of the court as error.

103rd.

The court erred in allowing the witness Trask to be asked and to answer thw following question: "You may state whether or not the stone monument to which you have testified was ever pointed out to you by Michael Carlin?" which question was objected to by the plaintiff; the objection was overruled by the court, and the plaintiff now assigns such action of the court as error.

104th.

The court erred in sustaining the objection of the defendant to the question asked the witness X. S. Burke, who, after testifying that he knew very nearly where the vein run with reference to the map, and that he knew where the discovery of the Stem-
304 winder was, was asked the following question: "How wide is the vein there east of the discovery?" to which the defendant objected and the objection thereto was sustained by the court and the witness was not allowed to answer the same; to which ruling of the court the plaintiff then and there excepted and now excepts and assigns such action of the court as error.

105th.

And, furthermore, as a part of the motion for a new trial herein upon the ground of newly discovered evidence, that the plaintiff will use in support of that branch of the motion the affidavits of George B. McAulay, Van B. De Lashmutt, X. S. Burke, Frank C. Loring, and S. R. Devine, upon the ground that said newly discovered evidence is new and material to the plaintiff, which it could not with reasonable diligence have discovered and produced upon the trial, as shown by said affidavits.

106th.

The plaintiff now further excepts to the judgment herein entered on the 5th day of October, 1888, and says the same is not sustained by the evidence, issues, or pleadings in this case, in this: that the said judgment recites that the Emma mining claim was located the 17th day of September, 1885, by John Flaherty, Michael Carlin, —— Smith, and John M. Burke, which judgment to that extent is not sustained by the evidence or the verdict herein, and now assigns the said recital and the said judgment as error.

107th.

Also the plaintiff excepts to said judgment and moves to vacate it on the ground that it is erroneous and not sustained by the issues, evidence, and pleadings herein, in this: that the evidence shows that the Emma lies more than 300 feet on the east side of the vein which was located as the Emma vein, and that defendant in no case

is entitled to a patent for more than 300 feet on each side of the centre of the vein.

108th.

And the plaintiff furthermore states that the said verdict and judgment are against law, in this: that the evidence failed to show that the locators of the Emma mining claim ever made a valid location upon said premises now claimed as the Emma mining
305 claim, and that said claim is more than 300 feet; is located across the vein and lies over 1,100 feet on the east side of the centre of said vein, and that there is no proof that the Last Chance Consolidated Mining Company is a corporation whose stock is owned, or at least four-fifths of it is owned, by citizens of the United States, and that no valid notice of location was ever made of the Emma mining claim, and that said area in conflict is entirely within the exterior boundaries of the Stemwinder mining claim as originally located and as described in the amended location thereof.

Wherefore the plaintiff now comes and prays that said verdict be vacated and set aside, and that the judgment herein be vacated also and set aside, and that a new trial herein be granted.

ALBERT HAGAN,
ALBERT ALLEN,
Attorneys for Plaintiff.

MURRAY, *December 28th*, 1888.

The above statement is allowed and I hereby certify the same to be correct.

JOHN L. LOGAN,
Judge 1st Judicial District, Idaho Territory.

Attest: F. H. GRIERSON, *Clerk*,
By BARRY N. HILLARD, *Deputy.*

Endorsed: No. 282. District court, first judicial district, Idaho, in and for Shoshone county. The Stemwinder M'ng Co. *vs.* The Emma & Last Chance Con. M'ng Co. *et al.* Statement on motion for a new trial. Filed October 19th, A. D. 1888. F. H. Grierson, clerk, by John P. Sheehy, deputy. Albert Hagan and Albert Allen, att'ys for pl'ff. Refiled after judge's certificate Dec. 28th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

306 And afterwards and on October 19th, 1888, plaintiff filed the affidavit of Van B. De Lashmutt herein, which is in words and figures as follows, to wit:

307 (Title of Court and Cause.)

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

VAN B. DE LASHMUTT, being duly sworn, deposes and says:

I am the president of the Stemwinder Mining Company. My place of residence and the head office of the said company is at Portland, Oregon. I have had no means or opportunity of finding out the whereabouts of Samuel R. Devine, nor did I know what he would swear to, nor was I able to ascertain. The facts embraced in the foregoing affidavit of said Samuel R. Devine are newly discovered material and not cumulative and were only ascertained by me this morning. I was on my way to Portland; was detained here in the town of Spokane Falls by the lateness of the train, when I met Mr. Devine accidentally. He had just come down from British Columbia and he informed me of what he has sworn to. This affidavit is made in good faith. If the whereabouts of Mr. Devine could have been ascertained and the facts he has sworn to had been known, he would have been obtained and produced on the trial, or his deposition would have been taken. This affidavit is made not for the purpose of delay, but for the purpose of procuring a new trial, that justice may be done between the parties.

VAN B. DE LASHMUTT.

Subscribed and sworn to before me this 3rd day of October, A. D. 1888.

[SEAL.] PAUL J. STROBACH,
Notary Public in and for Washington Territory.

Endorsed: Original. No. 282. The 1st jud. dist. court, Shoshone county, Idaho Territory. The Stemwinder M. Company *vs.* The Emma and Last Chance M. Company, Jno. M. Burke, *et al.* Affidavit of Van B. De Lashmutt. Service accepted after filing by a true copy this October 19th, 1888. Woods & Heyburn, att'ys for def'ts. Filed October 19th, A. D. 1888. F. H. Grierson, clerk, by John P. Sheehy, deputy.

308 And afterwards and on the 19th day of October, the plaintiff filed the affidavit of Geo. B. McAulay herein, which is in words and figures as follows, to wit:

309 (Title of Court and Cause.)

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

GEORGE B. MCAULAY, being first duly sworn, deposes and says—

That he is and at all times hereinafter set forth has been the managing agent and attorney-in-fact for the plaintiff within the said county and Territory, and that he has, together with the attorneys of the plaintiff in said cause, been at various times since the

commencement of this action engaged in hunting up evidence for the plaintiff, to be used at the trial of said cause by plaintiff, and for such purpose he and the said attorneys for the plaintiff have at divers times attempted to procure the testimony of S. R. Devine, the original locator of the Stemwinder mining claim, who alone knows the facts concerning the original location of and the marking of the boundaries of the Stemwinder mining claim and the ground covered by said location; that said Devine left Idaho Territory in the spring of 1887, and has never resided therein since then, but has been in British Columbia, as affiant is informed and believes; and although affiant and his said attorneys have made many attempts to procure the attendance and testimony of said Devine, they have been unable to find him or procure his testimony; that neither the president of plaintiff -or his attorneys or this affiant knew of the facts or were ever informed of the facts set out in the affidavits of S. R. Devine, X. S. Burke, and Frank C. Loring until after the trial of said cause, when said Devine was accidentally met by Mr. De Lashmutt, president of the plaintiff, at Spokane Falls, and he, the said Devine, for the first time detailed the facts stated in his affidavit; nor did affiant or any of his attorneys or any agent or officer of plaintiff know of the whereabouts of said Devine until he was so found as detailed in the affidavit- of said Devine and said De Lashmutt, president of said plaintiff.

That said evidence of said Devine is new, material to the issues herein, and not cumulative; nor will it be brought for the purpose of impeaching any witness or any evidence of any witness or testimony of any witness who has been heretofore examined in
310 the said action, and was not discovered until after the trial of said cause.

That neither affiant or the attorneys for plaintiff nor any agent or officer of plaintiff knew of the existence of the evidence set out in the affidavits of S. R. Devine, X. S. Burke, and Frank C. Loring at the time of the trial hereof and could not by the use of reasonable diligence or any diligence have discovered and produced the same upon the former trial, and that the same facts apply to the facts set out in the affidavits of Burke and Loring above referred to; that if a new trial be had herein the affiant can procure and produce at such trial all of said witnesses or their testimony by deposition; that affiant and Albert Hagan, attorney for plaintiff, and Frank Ganahl, also attorney for the plaintiff, have repeatedly attempted to find said Devine and procure his testimony herein, but have failed after all such efforts, made in good faith, and did not know until after the trial hereof what said Devine would swear to.

GEORGE B. McAULAY.

Subscribed and sworn to before me this 17th day of October, 1888.

H. M. DAVENPORT,

[SEAL.] *Notary Public.*

Endorsed: Original. In 1st dist. court, Shoshone county, Idaho Territory. The Stemwinder M. Co. *vs.* John M. Burke *et al.* Affi-

davit of Geo. B. McAulay. Service of a copy of the within affidavit accepted this the 19th day of October, 1888, after filing of its original with clerk of said court. Woods & Heyburn, atty's for def'ts. Filed October 19th, A. D. 1888. F. H. Grierson, clerk, by James P. Sheehy, deputy.

311 And afterwards and on the 19th day of October, A. D. 1888, plaintiff filed the affidavit of Samuel R. Devine herein, which is in words and figures as follows, to wit:

312 (Title of Court and Cause.)

TERRITORY OF WASHINGTON, } ss:
County of Spokane, }

SAMUEL R. DEVINE, being duly sworn, deposes and says:

I am the original locator of the Stemwinder Lode mining claim. I am thoroughly familiar with the ground embraced in said location and the area in conflict involved in this action. The Stemwinder Lode mining claim was located by myself on the 17th day of September, 1885. The facts and circumstances attending such location of the Stemwinder are as follows:

On the morning of the 17th of September, John Flaherty, Mike Carlin, and Jack Smith came with me from Jackass prairie. Flaherty and myself went to the Bunker Hill. Carlin went somewheres on the other side of the creek—that is, on the Sullivan side. I don't know where Smith went to. I didn't see him at all afterwards. Flaherty proposed that I should take one claim and he the other, to the east and south and parallel with the Bunker Hill. I left him there, on what is now the Bunker Hill, and went north and discovered what is now the Stemwinder, and came back and found him on what is now the Richmond, and told him that he could take all that ground south and east of the Bunker Hill and I should take my claim to the north and west of the Bunker Hill. Before returning to Flaherty I had made my discovery of the Stemwinder; had drawn my notice and posted it at the point of discovery. I put this notice on a post. I wrote it on a piece of paper and tacked it on this post with pins. The post was about six feet long and three inches through. The point of discovery was a bluff of iron rock carrying galena—all shooting rock. I put up a stake at the point where the galena and carbonate showed. I leaned the stake against a point of rocks. A big high rock came out and made a notch and I placed the stake in that notch and secured it the best way I could. I then went down and told Flaherty the resolution I had come to. I then returned and staked the claim the same day. The claim was well staked and well marked, as mining — usually are. I am an old miner and prospector and know how to locate a claim and how to stake it. The first stake that I placed was the north-
313 west corner stake. I blazed it with a small hatchet and marked on the blazes "northwest corner stake of the Stemwinder." I then came down the hill from the northwest corner and

established the southeast corner. The southeast corner was a tree. I blazed it first and cut it off afterwards. I blazed it on four sides. It was four or five feet above the ground. After blazing it I marked it "southeast corner of the Stemwinder." The next stake that I established was the east centre end stake, on the west side of the creek. This was a tree also, about ten inches through—a pine tree. I blazed this on four sides, and subsequently cut it off four or five feet from the ground. I marked this "east centre end stake of the Stemwinder." The next stake that I marked was the northeast corner stake, which was on the west side of the creek. This was a stake—a round stake but squared at the top—about four or five inches through and about five feet high. I planted this stake in the ground and secured it as firmly as I could with rocks piled around. I marked this "northeast corner stake of the Stemwinder." I then marked the west centre end stake. This was a big tree, blazed—a big tamarack stub, broke off sixty feet high. I blazed it and marked it "west centre end stake of the Stemwinder." On the next day I established the southwest corner. This was a stake—a round stake hewed off at the end, and four to six inches in diameter. I marked this "southwest corner stake of the Stemwinder." In running the lines of this claim I stepped them off the best way I could, and aimed to take no more than the law allowed. The claim is fifteen hundred by six hundred feet. I made a copy of the notice as posted by me upon the claim, and on the twenty-first day of September, 1885, handed it to John Colwell, deputy recorder and also mining recorder for Yreka mining district, to record. This notice was subsequently recorded according to law, in the county recorder's office, by Colwell, Colwell at that time being the mining recorder of that district and also the deputy mineral recorder for the county recorder, and the notice as recorded is a fac-simile of the copy that I posted on the claim. The first that I saw or heard of the so-called Emma location was on the twenty-first. On the morning of the nineteenth I met Jack Smith. He said he had a claim
314 there, and had then finished staking it. He had put up a stake at my northeast corner. I saw the stake on the opposite side of the creek from my northeast corner. It didn't infringe on my stakes, and I paid no attention to it. I then went up on the claim and found that I was, as you might say, cross-staked. I found the stake up there. They had staked a line from my southwest corner clear across my claim, running from the east down through the claim, through my discovery, to the west. I subsequently made him take that stake up. On the evening of the 20th or the morning of the 21st I first saw that they had a discovery and named it the Emma, with their notice on it, inside of the lines of the Stemwinder. Mike Carlin went with me and showed me the discovery and their notice. The original notice that was then on the claim as I found it was dated the 18th and claimed one thousand feet easterly and five hundred feet westerly. On the evening of the 20th or the morning of the 21st another notice was put up by Carlin and antedated to the 17th, claiming five hundred feet easterly and one thousand feet westerly. This was done in my presence by

Carlin. There was also a notice put upon the Last Chance mine at the same time. I told him then that his notice of the Emma and his discovery was inside of my ground—inside of the lines of the Stemwinder. I also told Mr. Flaherty the same thing and told him to keep off my ground. He said he would fix it up; that it would be all right between him and me, and that he would fix it up. I told him that I had nothing to fix up; that all I wanted was for him to get off my ground, which he subsequently did by removing his southwest corner stake. The notice of the Emma as originally located by this man was inside of the lines of the Stemwinder and is still within these lines as located. I never changed any of my location stakes of the Stemwinder after I had planted them. The stakes remained and the location remains as originally located, except that the tops of the trees were chopped off by me. I started to work at the point of discovery. The discovery stake was continually falling down, and I had no means of securing it. I marked the point of rock with a big cross as the point of discovery and called witnesses—C. E. Tyler and Mike Carlin—to witness that that was the point of discovery. I then took the stake and placed it a little
315 further down the hill—to the east and possibly a little to the north—simply to get it out of my way. But the point of discovery I marked on the rock with a big cross and called witnesses to show them that that was my point of discovery. I never changed my point of discovery, and held it and worked it as my point of discovery until I sold the mine. I am a citizen of the United States and a native of the State of Michigan, where I was born on the eighth day of November, 1842. I left the Cœur d'Alenes two years ago last March, and am now and have been for the last six months a resident of Kootenai, in British Columbia, where I am engaged in mining and merchandising. I am here in Spokane Falls simply on business; my whereabouts for the last six months have not been known to any person that I know of in Shoshone county except one David Hutchinson, who was in with me in the Bamboo Chief. I make this affidavit that justice may be done and at the request of Van B. De Lashmutt, president of the Stemwinder Company, whom I accidentally met this morning at this place. If a new trial is granted in the above cause I will be present at the trial of said cause and verify therein what I have herein stated. I do not know the whereabouts of either C. E. Tyler or J. P. Smith.

S. R. DEVINE.

Subscribed and sworn to before me this 3rd day of October, A. D. 1888.

PAUL J. STROBACH,

[SEAL.] *Notary Public in and for Washington Territory.*

Endorsed: Original. The first jud. dist. court, Shoshone county, Idaho Territory. The Stemwinder M. Co. *vs.* John M. Burke *et al.* Affidavit of S. R. Devine. Filed October 19th, A. D. 1888. F. H. Grierson, clerk, by John P. Sheehy, deputy. Service of the within

affidavit accepted and a true copy thereof received after filing. Woods & Heyburn, att'ys for def'ts. October 19, 1888.

316 And afterwards and on the 19th day of October, A. D. 1888, plaintiff filed the affidavit of X. S. Burke and Frank C. Loring herein, which is in the words and figures as follows, to wit:

317 (Title of Court and Cause.)

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

FRANK C. LORING and X. S. BURKE, being each duly sworn, deposes and says, each for himself and not one for the other—

That he is a mining and civil engineer and deputy United States mineral surveyor, residing at Wardner, Idaho Territory.

That he knows the ground and premises in controversy herein, including the area in conflict as well as the original Stemwinder and Emma locations.

That affiant has read the affidavit of S. R. Devine herein and knows the points referred to in the same, as he went upon the ground to look — the same, after reading said affidavit and knowing the contents thereof, for the purpose of making measurements and hunting up the relative positions and distances of the Stemwinder and Emma discovery points and the respective points where the notices of location thereof were placed and were to be found.

That both affiants assisted in making the observations and measuring the distances hereinafter set forth.

That the facts hereinafter set forth are material to the plaintiff upon his motion for a new trial herein, and affiants believe, from a long familiarity with the above action and the issues therein, the plaintiff could not with reasonable diligence herein have discovered the same and produced the same at the trial.

That S. R. Devine, the original locator of the Stemwinder, was not present at the said trial nor was his testimony given thereon, nor did this affiant have any knowledge of the said facts until after the said trial.

That in order to procure said facts these affiants went upon the said premises on the 10th day of October, 1888, and proceeded to a point at which the original notices of discovery of the Stemwinder were posted, which point is about 24 feet south of the original
318 discovery cut of the Stemwinder. This point is on a reef of iron rocks and lays about 24 feet south of a small cut showing galena. At the point where the stakes set there is mineral in sight in rock in place showing galena and oxide of lead. From this point we ran three hundred (300) feet at right angles to the south side line of the Stemwinder and established a point. We then established a line parallel to what were the original south side line of the Stemwinder, but is now the end lines under the amended location, which line is at all points equally distant from the south

side line of the Stemwinder as originally claimed. This line shows all of the iron reef on which the Emma discovery was made to be inside of the Stemwinder and south of the line that we established. We then found a stub or tree about six inches in diameter and twelve (12) feet high, rotten on the outside and hewed until a blaze of solid wood was made to receive the writing, standing within fifteen (15) feet of the ledge of iron rock. It was blazed on four sides. On this tree or stub the discovery notice of the Emma had been originally written. This appears to be several years old. It is badly obliterated and only a portion can be made out, and has the appearance of having been purposely obliterated, to a great extent, with scratches. This tree stands thirty-six (36) feet south of the established line mentioned above and within the Stemwinder claim, and also stands twenty (20) feet south of the south side line of the Emma as surveyed for patent and about eighty (80) feet south from what is now claimed as the Emma discovery. After careful inspection we disciphered the following writing on said stub or tree:

Notice of----------ca------

------.----------citizens of the------States claim fif--n ------feet in length of this----------

----------Emma ----------

Locators.

JACK SMITH.
MIKE CARLIN.
------ FLAHERTY.
J. M. BURKE.

----------feet west from this stake----------
feet east. Located September 17th, 1885.

319 There is a stake standing about twenty (20) feet to the north of this stub mentioned above, inscribed in what seemed to be and was in Mr. Trask's handwriting, marked south side line of the Emma. The Mr. Trask here referred to is the deputy mineral surveyor who surveyed the Emma for patent and who testified herein as a witness for defendants.

From measurements made on the ground we found that no point on the iron reef on which the discovery of the Stemwinder was made by Devine would be far enough to the south to bring this stub spoken of to the north of a line three hundred (300) feet from the discovery of the Stemwinder. To explain further: The reef does not extend to the south to exceed ten (10) feet in any place from the point measured from as the discovery of the Stemwinder. We found that the point at present claimed as the Emma discovery cut and where their application for patent is posted is in loose slide rock, no rock in place being in sight, but a loose slide of slate, and lays fully fifty (50) feet north of the iron reef on which a discovery might have been made. The point referred to and the present alleged discovery of the Emma are within the lines of the orig-

inal Stemwinder and the amended location of the Stemwinder. A rough diagram showing the relative position of these points is hereto attached and made a part of this affidavit. The vein upon which the Stemwinder was originally located and as now located and that upon which the Emma is located and claimed is one and identically the same vein, and the said vein runs from the south centre end post of the Stemwinder, as shown in the amended location, to and over including both points of discovery and crossing the two claims as shown in said diagram, and is one continuous vein, and that the amended location notice of the Stemwinder does not claim to exceed three hundred (300) feet on each side of the middle of said vein so located.

X. S. BURKE.
FRANK C. LORING.

Subscribed and sworn to before me this 15th day of October, 1888.
H. M. DAVENPORT,
[SEAL.] *Notary Public.*

320 Endorsed: Original. The first jud. dist. court, Shoshone county, Idaho Territory. Stemwinder M. Co. *vs.* John M. Burke *et al.* Affidavit of Burke and Loring. Service of a copy of the within affidavits of X. S. Burke and Frank C. Loring admitted, after filing the original with clerk, this 19th day of October, 1888. Woods & Heyburn, att'ys for def'ts. Filed October 19th, 1888. F. H. Grierson, clerk, by John P. Sheehy, deputy.

And afterwards and on the 28th day of November, A. D. 1888, plaintiff filed the affidavit of Michael Carlin herein, which is in words and figures as follows, to wit:

321 TERRITORY OF IDAHO, } ss:
County of Shoshone, }

(Title of Court and Cause.)

MICHAEL CARLIN, being first duly sworn, on his oath says—

That he has heard read the affidavit of Samuel R. Devine, filed in the above-stated case on plaintiff's motion for a new trial, and the statement therein contained as to the exact point at which he first discovered mineral on the Stemwinder Lode mining claim, and which place he adopted as his discovery, and at which place he posted his notice of location of said claim; that he is familiar with the point so described in said affidavit, and that on the 21st day of November, A. D. 1888, he went upon the said Stemwinder mining claim in company with W. C. Miller, Charles Sweeney, John Smith, A. M. Esler, and Mr. Woodward, and without difficulty found and identified the exact place described in said affidavit as the point of discovery on the Stemwinder Lode claim, and further identified it as the point where he saw the discovery and discovery notice and post of the said claim at the time of the location of said mining

claim, as testified to by him on the trial of the said cause, and that he pointed the said place out to the aforesaid W. C. Miller, Charles Sweeney, John Smith, A. M. Esler, and Woodward.

That the said W. C. Miller thereupon, on the said 21st day of November, 1888, surveyed and measured a line from said point so pointed out by the affiant in a northerly direction and at right angles to the general course of the said Stemwinder claim as originally located and directly towards the mound of stone which affiant testified on said trial was placed to mark the south line of the Emma mining claim and the boundary between the Stemwinder and Emma mining claims, and said survey and measurement was made in the presence of this affiant and the distance ascertained by said measurement to be 298.6 feet. The said point of discovery is the same point which was pointed out to the affiant by the said Devine as the point of discovery of the Stemwinder mining
322 claim, as testified to by affiant on the said trial of the said cause

Affiant has heard read the statement in the said affidavit of S. R. Devine that the locators of the Emma claim staked a line from the southwest corner of the Stemwinder through his doscovery to the west, and that the said Devine subsequently made said locators take up the said stakes, and affiant says that the said statement is not true in any particular. Affiant has also heard read the statement in the said affidavit contained that on the evening of the 20th or the morning of the 21st day of September, 1885, the affiant placed a notice upon the Emma Lode claim antedated to the 17th of September, 1885, and affiant says the statement is not true in any particular; that on said day there was and had been posted on the said Emma mining claim since the 17th day of September a notice of location of said claim, and that the said Emma claim was located on the said 17th day of September, 1885, by himself, J. M. Burke, John Smith, and John Flaherty upon a discovery of mineral in place, and that the point of such discovery was not within the boundaries or lines of any other mining claim, and that said point of discovery was on the vacant, unoccupied, and unappropriated public domain of the United States.

Affiant has heard read the statement in said Devine's affidavit that said Devine told affiant that the discovery of the Emma claim was within the boundaries of the Stemwinder claim, and affiant says that such statement is not true; that it was not claimed or asserted at any time by the said Devine that the discovery of the Emma was within the boundaries of the Stemwinder. Affiant denies that the southwest corner stake of the Emma claim was ever moved at the instance of the said Devine or at all.

MIKE CARLIN.

Subscribed and sworn to before me this 21st day of November, A. D. 1888.

[SEAL.]

THOS. J. MULLEN,
Notary Public.

323 Endorsed: No. 282. In the district court of the first judicial district of Idaho Territory in and for Shoshone county. The Stemwinder M'g Co., plaintiff, *vs.* The Emma and Last Chance Consolidated M'g Co. *et al.* Affidavit of Michael Carlin on plaintiff's motion for a new trial. Filed the 28th day of November, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods & Heyburn, attorneys for def'ts.

And afterwards and on the 28th day of November, A. D. 1888, plaintiff filed the affidavit of Charles Sweeney herein, which is in words and figures as follows, to wit:

324 (Title of Court and Cause.)

TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

CHARLES SWEENEY, being duly sworn, on his oath says—

That he has read the affidavit of Samuel R. Devine, filed in the above-stated cause on plaintiff's motion for a new trial, and the description therein contained of the discovery point of the Stemwinder lode mining claim; that after having read the said affidavit he went upon the said Stemwinder Lode claim in company with W. Clayton Miller, Michael Carlin, John L. Smith, A. M. Esler, and William Woodward, and directly to the said point so described, and without difficulty identified the same.

That the excavation formerly made by the said Devine at the point of discovery has been carefully built up with rocks by some person unknown to the affiant, in such a manner as to indicate that an attempt was made to hide the same.

That affiant assisted on the 21st day of November, 1888, in measuring with a steel tape the distance from said point of discovery to the south side line of the Emma lode claim as surveyed for patent, and found the distance to be 298.6 feet to the southward side of the monument placed on said line, which said monument is a mound 3 feet in diameter at its base; that the said monument is the same one described and testified to by Michael Carlin upon the trial of the above-stated cause at the last term of the district court in said Shoshone county as having been placed at said point on said south side line of the said Emma Lode claim for the purpose of determining the boundary of the said Emma Lode claim and the said Stemwinder Lode claim.

CHARLES SWEENEY.

Subscribed and sworn to before me this 28th day of November, 1888.

THOS. J. MULLEN,
[SEAL.] *Notary Public.*

325 Endorsed: No. 282. In the district court of the first judicial district of Idaho Territory in and for Shoshone county.

The Stemwinder M'g Co., plaintiff, *vs.* The Emma and Last Chance Con. M'g Co. *et al.*, defendants. Affidavit of Charles Sweeney on plaintiff's motion for a new trial. Filed the 28th day of November, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Wood & Heyburn, attorneys for defendants.

And afterwards and on the 28th day of November, A. D. 1888, plaintiff filed the affidavit of W. Clayton Miller herein, which is in words and figures as follows, to wit:

326 (Title of Court and Cause.)

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

W. CLAYTON MILLER, being first duly sworn, on his oath says—

That he is by profession a civil and mining engineer; that on the 21st day of November, 1888, he, together with Charles Sweeny, Michael Carlin, John Smith, A. M. Esler, and —— Woodward, went upon the Stemwinder Lode mining claim, in Yreka mining district, Shoshone county, Idaho Territory, and to a point thereon described in the affidavit of Samuel R. Devine, filed in the above-stated case on plaintiff's motion for a new trial, as the point at which the said Devine discovered mineral on said mining claim and adopted as his point of discovery, at which point he placed his notice of discovery, as in said affidavit set forth; that by actual survey and careful measurement from the said point so described as the discovery of the Stemwinder Lode claim in a direction practically at right angles with the length of the said mining claim as originally located, and in the direction of the Emma Lode mining claim, lying to the northward of the said Stemwinder Lode claim, to a monument of rocks on the south line of the said Emma Lode claim, and found the distance to be 292.6 feet to the southward side of the said monument; that a surface measurement of the said distance would be 296.5 feet.

That at the time affiant made such survey he found the tape measurement of said distance on said line to be 298.6 feet, but afterwards found, by measurement and correction of his tape, that it, the measurement, was too long, and the actual distance is as first herein stated—292.6 feet. Affiant found the stub upon which the location notice was posted, as identified by M. Carlin, of the Emma to be 28 feet north of the south side line of the Emma; that the monument above referred to is located north 9 deg's east from the said discovery point of the Stemwinder Lode claim.

That affiant's attention has been particularly called to the description of the said discovery point of the Stemwinder Lode claim
327 in the affidavit of S. R. Devine, and by such description identifies the point from which the survey was made as aforesaid; that the said point is the one referred to in the affidavit of Michael Carlin made on the 21st day of November, 1888, and on file herein.

W. CLAYTON MILLER.

Subscribed and sworn to before me this 28th day of November, 1888.

THOS. J. MULLEN,
Notary Public.

[SEAL.]

Endorsed: No. 282. In the district court of the first judicial district of Idaho Territory in and for Shoshone county. The Stemwinder M'g Co., plaintiff, *vs.* The Emma and Last Chance Con. M'g Co. *et al.*, defendants. Affidavit of W. Clayton Miller on pl'ff's motion for a new trial. Filed the 28th day of November, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods & Heyburn, attorneys for defendants.

And afterwards and on the 28th day of November, A. D. 1888, plaintiff filed the affidavit of J. L. Smith *et al.* herein, which is in words and figures as follows, to wit:

328 (Title of Court and Cause.)

TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

JOHN L. SMITH, being duly sworn, on his oath says that he has read the affidavit of Samuel R. Devine, filed in the above-stated cause on plaintiff's motion for a new trial, and the description therein contained of the discovery point of the Stemwinder Lode mining claim; that after having read the said affidavit he went upon the said Stemwinder Lode claim in company with W. Clayton Miller, Michael Carlin, Charles Sweeney, A. M. Esler, and —— Woodward, and directly to the said point so described, and without difficulty identified the same; that the excavation formerly made by the said Devine at the point of discovery has been carefully built up with rocks by some person unknown to the affiant, in such a manner as to indicate that an attempt was made to hide the same; that affiant assisted on the said 21st day of November, 1888, in measuring with a steel tape the distance from said point of discovery to the south side line of the Emma Lode claim as surveyed for patent and found the distance to be 298.6 feet to the southward side of the monument placed on said line, which said monument is a mound 3 feet in diameter at its base; that the said monument is the same one described and testified to by Michael Carlin upon the trial of the above-stated cause at the last term of the district court in said Shoshone county as having been placed at said point on said south side line of the said Emma Lode claim for the purpose of determining the boundary of the said Emma Lode claim and the said Stemwinder Lode claim.

JOHN L. SMITH.

Subscribed and sworn to before me this 27th day of November, 1888.

F. H. GRIERSON, *Clerk,*
By BARRY N. HILLARD, *Deputy.*

[SEAL.]

329 Endorsed: No. 282. In the district court of the first judicial district of Idaho Territory in and for Shoshone county. The Stemwinder M'g Co., plaintiff, *vs.* The Emma and Last Chance Con. M'g Co. *et al.*, defendants. Affidavit of John L. Smith on plaintiff's motion for a new trial. Filed the 28th day of November, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Woods & Heyburn, attorneys for defendants.

330 FRIDAY, *Feb. 1st*, 1889.

SUPREME COURT,
Territory of Idaho, } *ss:*

(Title of Court and Cause.)

By agreement of respective parties it is ordered that the affidavit of Charles W. O'Neil be filed and considered a part of the transcript herein.

331 Supreme Court, Idaho Territory, 1st District, Shoshone County.

STEMWINDER MINING CO., Pl'ff & App.,
vs.
EMMA AND LAST CHANCE CON. M'N'G CO. *et al.*, Def't- & Resp.

Filed Feb. 1st, 1889.

S. H. HAYS,
Clerk Supreme Court Idaho Ty.

Supplemental transcript.

332 In the District Court of the First Judicial District of the Territory of Idaho in and for Shoshone County.

THE STEMWINDER MINING CO., Plaintiff,
vs.
JOHN M. BURKE *et al.*, Defendants. } Affidavit of Charles W. O'Neil.

TERRITORY OF IDAHO,
County of Shoshone, } *ss:*

CHARLES W. O'NEIL, being first duly sworn according to law, says that he is a practicing attorney in the above-named court and was on the 26th day of November, 1887; that under proceedings duly had in said court he was appointed referee to take testimony of S. R. Devine in the case of John M. Burke *et al.* against The Tyler Mining Co., a suit then pending in said court; that the said S. R. Devine's name is Samuel R. Devine, and that he is the same person who located the Stemwinder mining claim in Yreka mining district, in Shoshone county aforesaid; that in pursuance of his appointment as aforesaid, on the 26th day of November, 1887, he sat

at the office of W. B. Heyburn, in the town of Murray, for the purpose of taking the testimony of the said S. R. Devine; that the defendant, The Tyler Mining Company, was represented by Albert Hagan, Esq., and the plaintiffs, John M. Burke *et al.*, were represented by W. B. Heyburn; that the said S. R. Devine was called on behalf of the said defendant, and, after being duly sworn, on direct examination by Mr. Hagan, said that on the 18th day of September, 1885, "I went to work and staked that claim that night and then went to Evolution."

(By Mr. HAGAN:)

Q. What claim was it that you refer to that you took and staked on the 18th?

A. That is the one called the Stemwinder, and he took the
333 Richmond on the same day. There is a mistake of a day out there, but that does not matter.

Q. Did you see Flaherty on the 19th?

A. Yes, sir.

Q. Where was he?

A. I met Flaherty on the Stemwinder on the 19th.

That on cross-examination by Mr. HEYBURN the following questions were asked and the following answers made:

Q. On the 18th, I understand you to say, you located the Stemwinder?

A. Yes, sir; but there was a mistake in the date. I located it on the 18th by a notice dated the 17th. I supposed it was the 17th, but it really was the 18th.

Q. Do you know when the location of the Emma claim was made?

A. Well, sir, that is another hard question to answer. This is not the business we are on. I can't exactly swear to that.

Q. Was the notice of the Emma mining claim posted on the same day you located the Stemwinder?

A. Yes; it was the 18th; yes, sir.

Q. That notice was posted on the *that* same day?

A. Yes, sir.

Q. Did you see the notice of the Emma on that day?

A. I saw the notice of the Emma on the morning of the 19th.

Witness then testified that Michael Carlin witnessed his location notice on the Stemwinder.

Mr. HEYBURN then asked witness:

Q. What time of the day was it that he witnessed your notice?

A. It must have been in the afternoon; somewheres like that I had a lunch.

Q. Where did you go after he had witnessed your notice?

334 A. I went to Evolution.

Q. On the 18th?

A. Yes, sir; on the afternoon of the 18th.

Q. What time did you get to Evolution?

A. A little after dark.

Q. You left Carlin on the hill?
A. No; I left him in the gulch.
Q. What part of the gulch?
A. Right at the lower end of the Stemwinder claim. We went down together.
Q. Where was John Flaherty at that time that you left Carlin at the lower end of the Stemwinder?
A. I don't know—prospecting.
Q. How did you determine the distance of 300 feet between the place where the stone monument was placed and the discovery on the Stemwinder?
A. I measured it.
Q. What did you measure it with?
A. A tape-line.
Q. In a direct course?
A. Well, it was not directly at right angles, but then we could not tell exactly about that; we had no instrument.
Q. Who carr-ed the measuring line?
A. Smith and Carlin were with us.
Q. At which end were you on the line—the leading end or back end—in measuring?
A. I can't tell now. I was at the head end.
Q. Who is Smith?
A. He was a partner of mine in the Stemwinder.
Q. On what day did you establish the northwest corner of
335 the Stemwinder?
A. Staked it all but one corner on the same day.
Q. Which corner did you not stake?
A. Well, it was what I marked the southwest corner, the corner next to the Bunker Hill. I had no axe, and I could not cut a stake with a hatchet.
Q. You say on the day you staked the Stemwinder you supposed it was the 18th?
A. No, sir; I supposed it was the 17th; it was really the 18th and dated on the 17th.
Q. How long did that mistake about dates prevail there—when did you first know you had the wrong date?
A. I knew it that night when I went to Evolution.
Q. You went to Evolution that night you had staked the Stemwinder and posted the notice?
A. Yes, sir.
Q. And you then learned that it was the 18th?
A. Yes, sir.
Q. You learned it at Evolution?
A. Well, I got an old almanac there.
Q. Did you have any conversation as to what day of the month it was at the time you posted the notice on the ground?
A. A conversation with whom? No; I don't know that I did particularly. I did afterwards, but not that particular time.
Q. With whom?
A. I talked with Carlin and Flaherty about it afterwards.

Q. How long afterwards?

A. The next day, I think; I don't know; I can't say exactly about that; it was a day or two after that.

Q. What was said between you and them about that mis-
336 take in dates? They were under the same mistaken impression as to date that you were?

A. Well, that I don't know.

Q. Did they seem to be, from the conversation you had with them about it?

A. Well, that I can't tell either; just a remark passed in camp; that was all.

Affiant further says that the testimony was given and was taken down by me in *in* short-hand at the time, and that the same was shortly thereafter transcribed by type-writer; that he still has in his possession the original notes of the testimony so taken, and has examined the same at the time of making this affidavit, and that the same is as above set forth, and that no testimony was offered or received at the time of taking the same relative to the location of the Stemwinder mining claim except that above set forth.

CHAS. W. O'NEIL.

Subscribed and sworn to before me this 28th day of November, 1888.

[SEAL.] F. H. GRIERSON, *Clerk*,
By BARRY N. HILLARD, *Deputy*.

337 Endorsed: No. 282. In district court, Shoshone county, Idaho. The Stemwinder Mining Co. *vs.* John M. Burke *et al.* Affidavit of Chas. W. O'Neil. Filed November 26th, 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

(Title of Court and Cause.)

I hereby acknowledge service upon me of a copy of defendants' proposed amendments to plaintiff's statement on a motion for a new trial; also copies of the affidavits of W. Clayton Miller, M. Carlin, Charles Sweeny, and John L. Smith and Charles W. O'Neil on said motion.

Nov. 30th, 1888.

GANAHL & HAGAN,
Att'ys for Plaintiff.

Endorsed: No. 282. Stemwinder Mining Company *vs.* John M. Burke *et al.* Filed Jan. 23rd, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

338 TERRITORY OF IDAHO, } ss:
County of Shoshone, }

I, F. H. Grierson, clerk of the district court of the first judicial district of the Territory of Idaho in and for Shoshone county, do hereby certify that the foregoing transcript of papers from one to two (inclusive) contains full, true, and correct copies of the original affidavit of Charles W. O'Neil and acknowledgment of service of papers by plaintiff in the case of The Stemwinder Mining Co. *vs.* John M. Burke *et al.* (No. 282), now remaining in my office, in said county, and that an undertaking on appeal in due form has been properly filed by appellants.

Witness my hand and the seal of said district court this 24th day of January, A. D. 1889.

F. H. GRIERSON, *Clerk,*
[L. S.] By BARRY N. HILLARD, *Deputy.*

339 Endorsed: No. 282. In district court, Shoshone county, Idaho. The Stemwinder M'g Co. *vs.* John M. Burke *et al.* Affidavit of Chas. W. O'Neil Filed November 28th, A. D. 1888. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on the 5th day of January, A. D. 1889, an order denying motion for a new trial was filed herein; which order is in words and figures as follows, to wit:

340 STEMWINDER MINING COMPANY }
vs.
JOHN M. BURKE *et al.* }

This motion is not without its difficulties; but it seems to me that the main question in the case was decided by the jury adversely to the plaintiff, and I am not inclined to interfere with that verdict. No errors at the trial are sufficient, in my judgment, to call for a reversal of the verdict; yet the questions are certainly doubtful and had better be settled by the appellate court. The motion for a new trial is denied. I would liked to have given my reasons for this conclusion, but am unable to do so on account of the little time left me to dispose of the cases before me.

J. L. LOGAN, *Judge.*

Endorsed: No. 282. In the district court, Shoshone county, Idaho. The Stemwinder Mining Co. *vs.* The Emma and Last Chance Con. M'ng Co. *et al.* Order denying motion for new trial. Filed January 5th, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on the 5th day of January, A. D. 1889, an order fixing undertaking on appeal was filed herein, which is in the words and figures as follows, to wit:

341 (Title of Court and Cause.)

Now, on this 5th day of January, A. D. 1889, on motion of the plaintiff, made in open court, for an order of the court fixing the amount of undertaking to be given on appeal to stay execution in this action pending appeal, and the court having heard the argugument of counsel for plaintiff and defendand thereon and being fully advised in the premises, it is by the court ordered that the sum of two thousand five hundred dollars be, and the same is hereby, fixed as the amount and sum in which the plaintiff shall execute an undertaking to stay execution on appeal by plaintiff in this action.

And, on motion of plaintiff, it is further ordered that all proceedings in this action be further stayed until and including the 20th day of January, A. D. 1889, to enable the plaintiff to effect its appeal and give said undertaking herein.

Done in open court this 5th day of January, A. D. 1889.

By the court:

JOHN L. LOGAN, *Judge.*

Endorsed: No. 282. District court, Shoshone county, Idaho Territory. Stemwinder Mining Company *vs.* John M. Burke *et al.* Order fixing undertaking on appeal and staying proceedings. Filed January 5th, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

And afterwards and on the 10th day of January, A. D. 1889, plaintiff filed a stipulation herein, which is in words and figures as follows, to wit:

342 (Title of Court and Cause.)

It is hereby stipulated and agreed that the transcript on appeal herein may be filed on or before the third Monday of the present term of the supreme court and the said cause be heard at the present term.

GANAHL & HAGAN,
Attorneys for Plaintiffs.

Jan'y 10th, 1889.

WOODS & HEYBURN,
Attorneys for Defendant-.

Endorsed: No. 282. In the district court, Shoshone county, Idaho Territory. The Stemwinder M'n'g Co. *vs.* The Emma and Last Chance Consolidated M'n'g Co. *et al.* Stipulation. Filed January 10th, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. Ganahl & Hagan, att'ys for plaintiff.

And afterwards and on the 17th day of January, A. D. 1889, plaintiff filed a notice of appeal herein, which is in words and figures as follows, to wit:

343 (Title of Court and Cause.)

To the above-named defendants and respondents and to Messrs. Woods & Heyburn, their attorneys:

You and each of you will please take notice that The Stemwinder Mining Company, plaintiff in the above-entitled action, hereby appeals to the supreme court of Idaho Territory from the judgment made, rendered, and entered in said district court in said action on the 5th day of October, 1888, in favor of said defendants and against said plaintiff, with costs, and from the whole thereof.

2nd. You are hereby further notified that the said plaintiff and appellant also appeals to the supreme court of Idaho Territory from an order of the said district court made and entered and filed herein on the 5th day of January, 1889, overruling plaintiff's motion for a new trial herein and from the whole of said order.

Dated this the 18th day of January, 1889.

F. GANAHL AND
ALBERT HAGAN,
Attorneys for Plaintiff and Appellant.

Service of a true copy of the foregoing notice of appeal accepted this the 18th day of January, A. D. 1889, at Murray, Idaho.

WOODS & HEYBURN,
Attorneys for Defendants and Respondents.

Endorsed: No. 282. In first jud. court, Shoshone county, Idaho Territory. The Stemwinder M. Co. *vs.* The Emma and Last Chance Con. M. Co. *et al.* Notice on appeal. Original. Filed Januar*l* 17th, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

344 And afterwards and on the 17th day of January, A. D. 1889, plaintiff- filed their undertaking on appeal herein, which is in words and figures as follows, to wit:

345 (Title of Court and Cause.)

Whereas the plaintiff in the above-entitled action appeals to the supreme court of the Territory of Idaho from a judgment made and entered against said plaintiff in said action in the district court of the first judicial district of the Territory of Idaho in and for the county o- Shoshone, in favor of the defendants in said action, on the 5th day of October, 1888, determining the right of possession in and to certain mining property mentioned and described in the complaint herein to be in the defendants, together with costs of suit, amounting to 1,141.30 dollars;

And whereas plaintiff also appeals in like manner from an order made, filed, and entered in said cause by the said court overruling and denying plaintiff's motion for a new trial herein, which order was made and entered in the minutes of said court on the 5th day of January, 1889:

Now, therefore, in consideration of the premises and such appeal, we, the undersigned, James Cronin, David Fitch, J. W. Livers, and George B. McAulay, of the county of Shoshone, Territory of Idaho, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against it on the appeal or on the dismissal thereof, not exceeding three hundred dollars ($300.00), to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying the execution of said judgment so appealed from and the court having by its order fixed the undertaking herein on stay of proceedings of said judgment and costs at the sum of two thousand five hundred dollars (2,500), we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of twenty-five hundred (2,500) dollars, being double the amount named in the said judgment, that if the said judgment appealed from or any part thereof be affirmed or the appeal dismissed the appellant will pay to the defendants the amount directed to be paid by
346 the said judgment or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the supreme court in the court from which the appeal was taken, judgment may be entered in said action, on motion of the respondents, in their favor against the undersigned sureties for said sum of twenty-five hundred dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the appellant upon the appeals.

Witness our hands and seals this 17th day of January, 1889.

JAMES CRONIN. [SEAL.]
DAVID FITCH. [SEAL.]
J. W. LIVERS. [SEAL.]
GEORGE B. McAULAY. [SEAL.]

TERRITORY OF IDAHO, } ss:
County of Shoshone, }

James Cronin, David Fitch, J. W. Livers, and George B. McAulay, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and freeholder in the said county of Shoshone, Territory of Idaho, and is worth the sum in said undertaking specified as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

JAMES CRONIN.
DAVID FITCH.
J. W. LIVERS.
GEORGE B. McAULAY.

Subscribed and sworn to before me this 17th day of January, 1889.
[SEAL.] H. M. DAVENPORT,
Notary Public.

347 Endorsed: No. 285. In the first jud. dist. court, Idaho Ty., Shoshone Co. The Stemwinder M. Co. *vs.* The Emma and Last Chance Con. M. Co. *et al.* Undertaking on appeal. Filed January 17th, A. D. 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy. F. Ganahl and Albert Hagan, att'ys for appellants.

And hereafter and on January 17th, A. D. 1889, plaintiff filed a præcipe herein, which is in words and figures as follows, to wit:

348 *Præcipe.*

(Title of Court and Cause.)

To F. H. Grierson, clerk:

You are hereby requested to include in the record on appeal herein certified copies of the following documents:

Statement on motion for new trial, judgment-roll, bill of exceptions (plaintiff's), affidavit of S. R. Devine, do. Charles Sweeny, do. John L. Smith, *et al.*, order denying motion for new trial, affidavit of W. Clayton Miller, stipulation regarding time of filing motion for new trial, affidavit of George B. McAulay, Van B. DeLashmutt, Burke and Loring, and Mike Carlin, order fixing undertaking on appeal and staying proceedings, order relating to time for filing notice of motion and etc., notice of appeal, and undertaking on appeal; all minutes — entries in case from time to time of verdict not included above.

F. GANAHL AND
ALBERT HAGAN,
Attorneys for Plaintiff.

Endorsed: No. 285. Præcipe for transcript. Filed January 17th, 1889. F. H. Grierson, clerk, by Barry N. Hillard, deputy.

349 TERRITORY OF IDAHO, } ss:
County of Shoshone, }

I, F. H. Grierson, clerk of the district court of the first judicial district of Idaho Territory in and for Shoshone county, do hereby certify that the foregoing transcript of papers from one to forty-two (inclusive) contains full, true, and correct copies of the original appearance of defendants, answer of defendants, affidavits of Van B. De Lashmutt, George B. McAuley, Burke and Loring, S. R. Devine, Michael Carlin, Charles Sweeny, W. Clayton Miller, J. L. Smith, *et al.*, complaint, certificate to judgment-roll, demurrer, defendants' requests, decree, all journal entries taken in this action, notice of appeal, order denying motion for new trial, order fixing undertaking on appeal and stay of proceedings, plaintiff's requests,

plaintiff's exceptions taken at the trial, plaintiff's bill of exceptions (No. 2), præcipe for transcript, stipulation fixing time to file motion for new trial, summons, statement on motion for new trial, stipulation fixing time to file transcript, undertaking on appeal, verdict of the jury, and maps offered in evidence by plaintiffs and defendants in the case of The Stemwinder Mining Company against The Emma and Last Chance Consolidated Mining Company *et al.*, now remaining in my office in said county, and that an undertaking on appeal in due form has been properly filed.

Witness my hand and the seal of said court this 21st day of January, A. D. 1889.

F. H. GRIERSON, *Clerk*,
[L. S.] By BARRY N. HILLARD,
Deputy Clerk.

350 TUESDAY, *Feb.* 19*th*, 1889.

Supreme Court, Idaho Territory, *ss:*

STEMWINDER M'N'G CO., Pl'ff & App.,
vs.
EMMA & LAST CHANCE CON. MINING CO., Def't & Resp.

This day this cause came on for hearing, and, the argument not being completed, the further hearing of the same is postponed until to-morrow, the 20th inst.

WEDNESDAY, *Feb.* 20*th*, 1889.

(Title of Court and Cause.)

This day the hearing herein was resumed, and, not being completed, the further hearing herein is postponed until to-morrow, the 21st inst.

THURSDAY, *Feb.* 21*st*, 1889.

(Title of Court and Cause.)

This day, the hearing herein being concluded, the matter was taken under advisement by the court.

351 MONDAY, *March* 18*th*, 1889.

Supreme Court, Idaho Ter., *ss:*

THE STEMWINDER MINING COMPANY
vs.
EMMA & LAST CHANCE CONSOLIDATED MINING CO. *et al.*

Appeal 1st district, Shoshone county.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the court, and

all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Chief Justice Weir to the effect that the judgment of the court below be affirmed.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the first judicial district in and for the county of Shoshone in the above-entitled cause be, and the same is hereby, affirmed.

352 TERRITORY OF IDAHO, } ss:
County of Ada, }

I, S. H. Hays, clerk of the supreme court of Idaho Territory, do hereby certify that the foregoing is a full, true, and correct copy of the order and judgment entered in said cause in this court on the 18th day of March, 1889.

[Supreme Court Seal, Idaho Territory.]

S. H. HAYS,
Clerk of the Supreme Court of Idaho Territory.

353 In the Supreme Court of the Territory of Idaho. January Term, A. D. 1889.

THE STEMWINDER MINING COMPANY, Plaintiff and Appellant,
vs.
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY *et al.*, Defendants and Respondents.

Opinion.

WEIR, *C. J.:*

This is an appeal from a judgment in favor of the defendant and against the plaintiff entered upon the verdict of a jury, and also from an order denying a motion for a new trial. The cause of action arose in the county of Shoshone, in the first district. The complaint substantially alleges that the plaintiff is a corporation duly organized and existing under the laws of the State of Oregon, and that the defendant is likewise a corporation organized and existing under and by virtue of the laws of the same State; that since the 11th day of March, 1887, plaintiff has been and is now the owner of the premises in dispute, subject only to the paramount title of the United States, and is entitled to the possession of a certain mine and mining claim called the "Stemwinder mining claim," and then proceeds to set out the descriptions of the claims of the plaintiff and of the defendant, and that the grantors of the defendant, on the 6th day of March, 1887, filed with the register of the land office an application for a patent, and in such application wrongfully and without right set up title to certain premises, which the plaintiff claims is the property of itself, and that the suit is brought for the purpose of ascertaining the ownership of the said alleged tract of land in dispute; and then prays judgment against

the defendant, first, that the plaintiff is the owner of and lawfully in and entitled to the possession of the premises described,
354 the area in conflict between the Stemwinder mining claim and the alleged Emma mining claim and the lode therein, and quieting and confirming plaintiff's title thereto and the possession thereof, and that the defendants have no title to or right of possession of said conflicting area or the lode therein or any part thereof. The defendants demurred to the complaint in the action, which demurrer was overruled by the court, and the defendant was given five days in which to prepare and serve an answer.

The answer, though very long, contains substantially a general denial, and sets up title or claim to the premises in dispute by reason of a location thereof by certain parties and the transfer thereof to the defendant, and that such location was prior to the location made by plaintiff's grantors; and further claims that the location under which the plaintiff claims was never at any time located, staked, marked, and defined in accordance with the requirements of law, if at all, until long subsequent to the aforesaid location of the Emma mining claim by the locators thereof, and that the plaintiff is not nor has it ever been in possession of the area so in conflict as aforesaid. Upon these issues the case came to trial. The plaintiff offered such evidence as it saw fit as to the location of its claim and the defendant did the same.

Strictly there was but one issue in the case and that was, which of the parties made the first valid location of the area in dispute. The evidence on that point was conflicting and presented a question of fact for the jury. Upon this question the jury rendered a verdict in favor of the defendant and against the plaintiff. Whereupon the plaintiff made a motion for a new trial upon the proper papers, which motion was denied.

The questions presented for our consideration are the alleged errors made by the court in the admission of certain testimony, and as to the charge made by the court to the jury and its refusal to charge certain requests made by the plaintiff.

The only exception taken to the admission of alleged improper evidence by the court was in regard to a compromise monument erected along the alleged line between the claim of plaintiff and defendant. The defendant offered evidence to show that the compromise point was erected by agreement; not for the purpose of establishing a location, but for the purpose of showing where
355 the location was, as it was then understood by all the parties. This evidence the court, upon objection by the plaintiff, excluded; but it appears that a map used for other purposes on the trial contained upon its face the compromise monument, and that it was frequently referred to as the compromise monument, and as so referred to the question was really before the jury. It appears that the court permitted evidence by the engineer who surveyed the defendant's claim in December, 1886, in regard to having this compromise monument pointed out to him by the parties then claiming the ground as the compromise monument agreed upon by such parties themselves. We are by no means prepared to say that the evidence

as offered by the defendant was not admissable. Such evidence was not within the rule laid down by the authorities cited by the plaintiff, and did not seek in any manner to establish the location of a mining claim by parole, but, on the contrary, really sought to show that the claims as located were in some dispute and the parties ran the lines by agreement so as not to interfere with each other, and placed this monument only for the purpose of showing that they had done so. But even though this was error, the testimony admitted by the court was clearly right and proper. The engineer in making the survey referred to this compromise monument only to show how and in what manner he had made the survey. We see nothing in the admission of this testimony which was improper or which in any manner tended to prejudice the rights of the plaintiff.

We shall not notice the many exceptions taken by the plaintiff in regard to the charge of the court and the refusal of the court to make certain charges at the request of the plaintiff. Most of them are utterly without merit, for the reason that the court had already fully charged upon the propositions requested and also for the reason that many of the requests practically called for a decision upon the same proposition of law rejected by the court, couched in different language. The charge of the court as delivered was very full and complete and really presented to the jury every question necessary for their consideration, and the many requests made by the plaintiff were but a repetition of the charge already
356 given. We shall notice, however, three of the plaintiff's exceptions: First, those which relate to the defendant's location being in excess of the quantity of land allowed by law; second, the right of a corporation to locate a mining claim, and, third, the question raised by the plaintiff as to what distance the plaintiff was entitled to from the middle of the vein or point of discovery.

It is perfectly clear in our mind that the location of the defendant was not wholly void for the reason that the defendant's grantors did, in marking the boundaries of the location, placed their stakes more than 1,500 feet in length and 600 feet in width. Under the evidence in this case no fraud is alleged or claimed. No rights of third parties were infringed upon, and the evidence is conclusive that the location was made by measurements by the eye and by stepping off the distances; and it also appears that in December, 1886, the alleged location was surveyed and the lines were drawn in in such manner that the amount of the claim was not in excess of the amount allowed by law. This occur-ed prior to the plaintiff making its amended location, and under the facts of this case there can be no question that the location or claim of the defendant was void only as to the excess. The authorities would seem to be conclusive upon that point.

Atkins *v.* Hendree, 1 Idaho, 95.
Mining Co. *v.* Tarbett, 98 U. S., 464.
Richmond Mining Co. *v.* Rose, 114 U. S., 576.

It appears conclusively from the location notice placed upon the ground by the defendant's grantors at the time of location that they

only claimed 1,500 feet along the lode or vein and 300 feet on each side and no more. There is nothing in the contention that the decision of the court in the last case does not apply in principle to the present case. It is true that that case was decided under the act of 1866, and the present case arises under the act of 1872; yet the principle is the same. In that case the court says:

We hardly think it needs discussion to decide that the inclusion of a larger number of linear feet than two hundred renders a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake,
357 where there exists no intention to claim more than two hundred feet. Must the whole claim be made void by this mistake, which may injure no one, and was without design to violate the law? We can see no reason in justice or in nature of the transaction why the excess may not be rejected and the claim be held good for the remainder unless it interferes with rights previously acquired.

We do not, therefore, think it necessary to further consider this point, except to say that we find no error in the refusal of the court to charge on the subject as was requested by the plaintiff. Moreover, there was no merit in the plaintiff's requests. The location of the plaintiff as proven showed the same state of facts in relation to itself as did the defendant's, and the court would not have been justified under the evidence in charging the jury that the defendant's location only would be void.

The defendant requested the court to charge the jury that the plaintiff was a corporation organized under the laws of the State of Oregon, and that no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States. This the court charged. Without deciding whether this was error or not, we can safely say that it was not such an error in this case as would justify the court in reversing the judgment. There was no evidence that the corporation made the location. On the contrary, the evidence was conclusive that the corporation did not make the location, and the charge, even though error, could not in any way have injured the plaintiff. Besides this, the — defendant claimed was in precisely the same condition, and the evidence was conclusive there that the defendant did not make the location, but stood in the same position that the plaintiff did, namely, it had purchased its claim from citizens who had made locations. The charge of the court being perfectly clear as to the real facts of the case, and the case being properly submitted to the jury, to charge as the court did, under all the circumstances, was not in error, as such charge could not in any manner have injured any one. We therefore conclude that as to this point there was no error to justify us in reversing the judgment.

358 As to the third and last point which the plaintiff raises, we think there is nothing whatever in it, and that the charge as delivered by the court was perfectly correct under the facts in every respect. Under the circumstances the court would have been perfectly justified in refusing to consider the requests made by the

plaintiff at that time. But even as delivered and refused we find no error. The court stated to the jury that at the time of the location measurements must be from the point of discovery—the middle of the point of discovery—unless there is evidence before you that the vein has been actually established and run. But if the evidence is simply that there was a point of discovery, then the only knowledge you can have of the vein is that part which crops out at the point of discovery, and the parties must be entitled to 300 feet on each side of the middle of the vein at the point of discovery as they had so located this claim. It must not exceed 300 feet—that is, they are entitled to 300 on each side of the vein. This we think was proper, and was the only charge which could have been given to the jury under the state of the evidence.

The plaintiff seems to lay great stree on the fact that the court refused to charge the 22nd proposition required by it. In answer to this claim it is only necessary to say that from an examination of the record it will be found that the court charged the proposition except as — two or three lines which should not have been charged. At the conclusion of the charge the court verbally charged the jury as follows: That there is really but one question in this case, and that is who first made a valid location on this ground. That is really the whole question. Now, to determine that point you must go into all the evidence you have heard, reconcile it if you can, and ascertain, if you can, who, in your judgment, made a valid location upon that ground. If you find that the plaintiff made the first valid location, the plaintiff is prior in point of time, and, whatever may be the facts in this case, the plaintiff is entitled to a verdict at your hands. If you find, however, that the defendant made the first valid location of the ground in dispute, then the de-
359 fendant is entitled to a verdict at your hands. I state this to you so as to simplify the case and bring it down to the direct point in issue.

Under the pleadings and the evidence this charge was perfectly proper, and the jury could not have been mistaken as to what was the real issue in the case. The evidence was conflicting, but fully justified the verdict of the jury. The contention of the plaintiff that because the location notice, as recorded by the defendant, described the defendant's claim as adjoining the Stemwinder the defendant is estopped from claiming that its location is prior in point of time to plaintiff's, under the evidence and the explanation which was given of that statement, is utterly without merit.

We think that there is no error in the record which would justify this court in reversing the judgment. The judgment is therefore affirmed, with costs.

Judgment affirmed.

360 TERRITORY OF IDAHO, } ss:
County of Ada, }

I, S. H. Hays, clerk of the supreme court of the Territory of Idaho, do hereby certify that the foregoing 7 pages is a full, true, and correct copy of the opinion in the case of The Stemwinder

Mining Company *versus* The Emma and Last Chance Consolidated Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, as rendered and on file in said court and in my custody.

[Supreme Court Seal, Idaho Territory.]

S. H. HAYS,
Clerk of the Supreme Court of Idaho Territory.

361 In the Supreme Court of the United States.

THE STEMWINDER MINING COMPANY, Plaintiff in Error,
versus
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

Know all men by these presents that we, James Cameron and Thomas Wren, both residents, freeholders, and householders within the county of Shoshone and Territory of Idaho, are held and firmly bound unto the Emma & Last Chance Consolidated Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith in the full and just sum of three thousand dollars ($3,000.00), to be paid to the said Emma & Last Chance Consolidated Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 20th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a term of the supreme court of Idaho Territory, to wit, the January term, 1889, in the suit depending in said court between the Stemwinder Mining Company, appellant therein,
362 and the Emma & Last Chance Consolidated Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, respondents therein, judgment and decision was rendered against the said Stemwinder Mining Company, and the said Stemwinder Mining Company having obtained a writ of error herein from the Supreme Court of the United States, as required by the rules of said court and the statute in such cases made and provided, and filed a copy thereof in the clerk's office of said court to reverse the decision and judgment of the aforesaid suit, and a citation directed to the said The Emma & Last Chance Consolidated Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, citing and admonishing them to appear at the Supreme Court of the United States to be holden at Washington on the 2nd Monday of October, 1889, next:

Now, the condition of the above obligation is such that if the said Stemwinder Mining Company, appellant and plaintiff in error herein, shall prosecute its writ of error herein to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THOMAS WREN.
JAS. F. CAMERON.

Sealed and delivered in the presence of—
M. C. ATHEY.
E. E. ATHEY.

363 TERRITORY OF IDAHO, } ss:
County of Shoshone, }

James Cameron and Thomas Wren, sureties on the within and foregoing bond or bail in error, being first duly sworn, each for himself and not one for the other deposes and says that he is a resident freeholder and householder in the county and Territory aforesaid; that he is worth the amount mentioned in the foregoing bond or bail in error over and above all his just debts and liabilities in property situated in said county and Territory and not exempt from execution.

THOMAS WREN.
JAS. F. CAMERON.

Subscribed and sworn to before me this the 20th day of April, 1889.

M. C. ATHEY, [L. S.]
Notary Public.

Endorsements: Stemwinder M. Co., pl'ff in error, *vs.* Emma & Last Chance Con. M. Co., *et al.*, def'ts in error. Bond on appeal to U. S. Supreme Court. April 29th, 1889. Approved. H. W. Weir, C. J. Supreme Court, Idaho Territory. Filed May 1st, 1889. S. H. Hays, clerk.

364 TERRITORY OF IDAHO, } ss:
County of Ada, }

I, S. H. Hays, clerk of the supreme court of the Territory of Idaho, do hereby certify that the foregoing is the bond on appeal herein as certified and approved by the chief justice of said court—the foregoing three pages.

[Supreme Court Seal, Idaho Territory.]

S. H. HAYS,
Clerk of the Supreme Court of Idaho Territory.

365 In the Supreme Court of the Territory of Idaho.

THE STEMWINDER MINING COMPANY, Plaintiff in Error,
versus
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, Defendants in Error.

TERRITORY OF IDAHO, *County of Ada,* } *ss:*

I, S. H. Hays, clerk of the supreme court in and for the Territory of Idaho, do hereby certify that the foregoing 364 pages constitute and are a full, true, and correct transcript and copy of the pleadings, records, files, and exhibits in the case of The Stemwinder Mining Company *versus* The Emma and Last Chance Consolidated Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith now on file in my office and used as the transcript on appeal in said cause from the district court of the first judicial district of the Territory of Idaho in and for the county of Shoshone, and the same constitutes a full, true, and correct transcript and record of all and singular the papers, records, files, and exhibits now on file in my court therein and used on said appeal.

[Supreme Court Seal, Idaho Territory.]

S. H. HAYS,
Clerk of the Supreme Court of Idaho Territory.

366 In the Supreme Court of the United States.

THE STEMWINDER MINING COMPANY, Plaintiff in Error,
versus
THE EMMA & LAST CHANCE CONSOLIDATED MINing Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, Defendants in Error. } Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of Idaho Territory, Greeting:

Because in the records and proceedings, and also in the rendition of a judgment of a plea which is in the said supreme court, before you, between The Stemwinder Mining Company, plaintiff, and The Emma & Last Chance Consolidated Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, who are defendants, a manifest error hath happened, to the great damage of the said Stemwinder Mining Company, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws
367 and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the first day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Supreme Court Seal, Idaho Territory.

S. H. HAYS,
Clerk of the Supreme Court of Idaho Territory.

Allowed by me April 2d, 1889.

H. W. WEIR,
Chief Justice of the Supreme Court of Idaho Territory.

TERRITORY OF IDAHO, } *ss:*
County of Shoshone, }

We hereby accept service of the above and foregoing writ of error by receiving a true copy thereof at Murray, Shoshone county, Idaho Territory, this 29th day of May, A. D. 1889.

WOODS & HEYBURN,
Att'ys for Defendants & Defendants in Error.

368 In the Supreme Court of the United States.

THE STEMWINDER MINING COMPANY, Plaintiff in Error,
versus
THE EMMA & LAST CHANCE CONSOLIDATED MINING Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, Defendants in Error. } Citation.

UNITED STATES OF AMERICA, *ss:*

To the Emma & Last Chance Consolidated Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Idaho Territory, wherein The Stemwinder Mining Company is plaintiff and The Emma & Last Chance Consolidated Mining Company, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith are defendants in error, to show cause, if any there be, why the judgment in the said writ

of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 2nd day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

H. W. WEIR,
Chief Justice of the Supreme Court of Idaho Territory.

Service of a true copy of the above and foregoing citation accepted by us and acknowledged, at Murray, Shoshone county, Idaho Territory, this 29th day of May, 1889.

WOODS & HEYBURN,
Attorneys for Defendants and Defendants in Error.

369 In the Supreme Court of the United States.

THE STEMWINDER MINING COMPANY, Plaintiff in Error,
versus
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY, John M. Burke, Michael Flaherty, Mike Carlin, and Louis Goldsmith, Defendants in Error.

Now comes the plaintiff in error herein, The Stemwinder Mining Company, and makes the following assignment of errors upon which he will rely herein for a reversal of the judgment of the supreme court of the Territory of Idaho and the judgment of the court below, to wit, the district court of the first judicial district of the Territory of Idaho in and for the county of Shoshone, and assigns the errors as follows, to wit:

370 *Specification of Errors.*

The court erred in refusing to give the instruction asked for by plaintiff in error "that the locator of a mining claim must distinctly mark and define the location upon the ground by proper stakes and monuments so that the boundaries thereof can be readily traced, and that if the Emma locators placed stakes at a distance of 2,300 feet apart to define the length of their claim that the notice of location does not conform thereto, and that a location made so largely in excess of that allowed by law is of itself void and of no force or effect."

Which instruction the court refused to give; to which refusal the plaintiff in error excepted.

2.

And also the court erred in the same instruction by refusing to instruct the jury "that a subsequent survey of such claim without a re-adjustment of the boundaries and without any effort to mark or define the same according to law will not benefit the locators or remedy the defects of the original location."

Which instruction the court refused to give; to which refusal the plaintiff in error excepted.

3.

The court erred in refusing to instruct the jury as requested by the plaintiff "that a claimant who has not erected his boundary posts as the law requires will not be permitted to show the courses and distances of a recorded location that does not conform thereto where the rights of intervening locators without notice will be prejudiced."

Which instruction the court refused to give; to which refusal the plaintiff in error excepted.

4.

The court erred in refusing to instruct the jury as asked for by plaintiff "that a mining claim under the law cannot exceed
371 1,500 feet in length along the vein or lode and 300 feet in width on each side of the vein or lode, and the stakes marking the boundaries thereof must be placed at the points described by law or near enough thereto that any person honestly seeking to trace the boundaries of such claim might readily find them, and if they were not so placed the location was void."

Which instruction the court refused to give; to which refusal the plaintiff in error excepted.

5.

The court erred in refusing the instruction asked for by plaintiff "that if the jury find from the evidence that the boundary stakes marking the east end of the Emma claim were placed at such a distance from where the law required them to be placed that a person seeking to trace the boundaries of said claim could not readily have found the same, that they could not find for the defendant."

Which instruction the court refused to give; to which refusal the plaintiff in error excepted.

6.

The court erred in refusing to instruct the jury as asked for by plaintiff "that if they find from the evidence that plaintiff had established its prior right by a proof of the discovery of its grantor in and to the Stemwinder mining claim, worked and possessed the same in pursuance of said notice of location, disclosing mineral in place, posting a notice and marking the surface boundaries, and filing the original notice of location, and that thereafter, after the discovery of the course of the vein, the plaintiff and its grantors had ascertained the true strike and course of the vein as located, and had filed an amended location thereof in order to conform the same to the course of the vein, and if they further find that the Emma location was void, that they never amended their location or marked or defined the ground in the said Emma location in pur-

suance of the calls of the notice of the same, that they should find for the plaintiff.

372 Which instruction the court refused to give; to which refusal the plaintiff in error excepted.

7.

And the court erred in further refusing to instruct the jury "that an amended or additional notice of location upon the same ground, made with intent to remedy the defects in the original and filed according to the statute, was admissable in evidence, and served the same purpose as the original notice of location, and relates back to the first location of the claim."

Which instruction the court refused to give; to which refusal the plaintiff in error excepted.

8.

And the court further erred in instructing the jury "that if they found from the evidence that the discovery point of the Stemwinder lode was changed a distance of eighty (80) feet or thereabouts, and the amended location of the Stemwinder adopted the point of discovery as so changed and located at right angles to the course of the location as originally claimed, that this would be such a material change of the original location as to amount practically to a relocation."

To which instruction and the giving of which the plaintiff in error excepted.

9.

The court erred in instructing the jury, at the request of the defendant, "that the Stemwinder Mining Company is a corporation organized under the laws of the State of Oregon, and no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States."

To which instruction and the giving thereof by the court the plaintiff in error excepted.

373 10.

The court erred in instructing the jury "that the real point at issue in this case was who made the first valid location according to law, and that whoever made the first valid location had the right in point of time and was entitled to a verdict," and in further instructing the jury that that instruction did not govern all his other instructions, but only in part.

To which instruction and the giving thereof by the court the plaintiff in error excepted.

11.

And the court further erred in saying to the jury and instructing them "that the Stemwinder may have the prior valid location, but

if it did not lawfully include ground in dispute, then the instructions as to priority of location would not apply."

To which instruction and the giving thereof the plaintiff in error excepted.

12.

The court erred in refusing to instruct the jury, upon its second return into court, "that a locator may locate 300 feet in width on each side of the centre of the vein, and the question as to where the centre of the vein is at the surface is a question of fact for the jury, and in the absence of proof as to where the centre of the vein is that it would be at the point of discovery, but if the proof showed the centre of the vein at a different point from the discovery that the locator would hold 300 feet in width on each side of the centre of the vein, as shown in the evidence, within the boundaries of the claim as originally marked upon the ground."

Which instruction the court refused to give; to which refusal the plaintiff in error excepted.

13.

The court erred in refusing to instruct the jury "that if they found that the locator of the Stemwinder located upon the
374 vein and the location included less than 1,500 feet on the vein, and the vein was found to cross the location, then, if the location is found to be so made, the locator could take the vein to the limits of his side lines as so located, wherever it runs, and that 300 feet on each side of the vein means a measurement from the centre of the vein from any point within the location so made until it passes out of the exterior boundaries of the location."

Which instruction the court refused to give; to which refusal the plaintiff in error excepted.

14.

The court erred in allowing the witness George R. Trask to testify concerning any compromise line or point between the Stemwinder and the Emma mining claim, or as to any conversations about the same, or any admissions upon the part of Sandy Devine or any of the owners or locators of the Stemwinder mining claim.

15.

The court further erred in allowing the witness Mike Carlin to testify or give evidence in regard to any compromise line as measured, or of his measuring any point on the Stemwinder to another point on the alleged Emma mining claim, or testifying in any manner that the locators of the Emma had any controversy with Devine and Jim Smith, the supposed locators of the Stemwinder mining claim, that the controversy had been settled in any manner, or allowing the said witness to testify anything about what he, the witness, and the said Devine and Smith or any one did toward settling the controversy, or any controversy, as to the lines of the Emma

and Stemwinder mining claims; to all of which testimony when offered the plaintiff in error objected; which objection thereto was overruled, the testimony admitted; to which the plaintiff then excepted and now excepts and assigns as error.

16.

The court erred in admitting in testimony and having read to the jury the notice of location of the Emma Lode mining claim as recorded, for the reason that such notice does not contain such a description of the premises sought to be located by reference to
375 natural objects or permanent monuments as to identify the claim, and that the same is void for uncertainty, vague, and indefinite, and does not conform to the description of the ground as it was staked out, and does not conform to the requirements of the mining laws, either national or territorial.

17.

The court erred in overruling the objection of the plaintiff to the following question asked the witness Michael Carlin after he had testified that Sandy Devine had pointed out to him his notice on the Stemwinder, as follows, to wit: "Did you ever measure a distance from that point of discovery where the notice was posted in a direction practically at right angles with the claim as it was claimed at that time?" The objection of the plaintiff thereto being overruled, the plaintiff excepted and now excepts and assigns such ruling of the court as error.

18.

The court erred in allowing the following question to be asked the witness Carlin and answered by him, to wit: "Do you know about any change being made in the position of the discovery post or notice of the Stemwinder after the location of the Emma lode? State what you know about it." To which question the plaintiff objected; the objection was overruled; to which ruling of the court the plaintiff then and there excepted and now excepts and assigns such action of the court as error.

19.

The court erred in allowing the said witness Trask to be asked and to answer the following question: "What does that (the black spot marked on the map) indicate now with reference to your testimony?" "Ans. Compromise stake." To which question and answer the plaintiff then and there excepted and now excepts and assigns such action of the court as error.

20.

376 The court erred in allowing the witness Trask to be asked and to answer the following question: "You may state whether

or not the stone monument to which you have testified was ever pointed out to you by Michael Carlin;" which question was objected to by the plaintiff; the objection was overruled by the court, and the plaintiff now assigns such action of the court as error.

21.

The court erred in sustaining the objection of the defendant to the question asked the witness X. S. Burke, who, after testifying that he knew very nearly where the vein run with reference to the map and that he knew where the discovery of the Stemwinder was, was asked the following question: "How wide is the vein there east of the discovery?" to which the defendant objected, and the objection thereto was sustained by the court and the witness was not allowed to answer the same; to which ruling of the court the plaintiff then and there excepted and now excepts, and assigns such action of the court as error.

22.

The plaintiff in error now further excepts to the judgment herein entered on the 5th day of October, 1888, and says the same is not sustained by the evidence, issues, or pleadings in this case, in this, that the said judgment recites that the Emma mining claim was located the 17th day of September, 1885, by John Flaherty, Michael Carlin, Smith, and John M. Burke, which judgment to that extent is not sustained by the evidence or the verdict herein, and now assigns the said recital and the said judgment as error.

Also the plaintiff in error excepts to the judgment herein and moves to vacate it on the ground that it is erroneous and not sustained by the issues, evidence, and pleadings herein, in this, that the evidence shows that the Emma lies more than 300 feet on the east side of the vein which was located as the Emma vein, and that defendant in no case is entitled to a patent for more than 300 feet on each side of the centre of the vein.

377

23.

The court erred in instructing the jury "that if they found from the evidence that S. R. Devine included more than 300 feet within his stakes on the northerly side of the point of discovery of the Stemwinder mining claim at the time the notice was posted that his location was void as to the excess, and that if such excess was originally included within the boundaries of the Emma location it belonged to the Emma location."

To which instruction and the giving of which the plaintiff in error excepted.

24.

The plaintiff further assigns as error herein that the Emma claim as located and staked was void by reason of excess in such staking and locating.

25.

The court erred in refusing to give the instruction asked for by the plaintiff in error in the court below in which the court was asked to instruct the jury "that under the law four things were necessary to perfect a location: 1st, the discovery of a vein or lode within the surface located; 2nd, the posting of a notice at the point of discovery; 3rd, marking and defining the boundaries of the claim so located; and 4th, recording a location notice containing a description of the claim, the names of the locators, and the date of the location."

26.

It was error in the court below to refuse to give the following instructions asked for by the plaintiff in error herein, to wit: Now if you find from the evidence that the location of the Emma lode was not so marked upon the ground that the boundaries thereof could be readily traced at the time of the original location thereof, and that the locators thereof, or those claiming under them, have not since made or attempted to amend such location or to relocate the same, then such location was and is void, and in that case it
378 will be unnecessary for you to inquire as to the priority of the respective locations in controversy herein.

Which instruction the court refused to give; to which refusal the plaintiff in error excepted.

27.

It was error in the court below to refuse the 22nd instruction asked for by the plaintiff in error—

If in marking the location of a mining claim upon the ground the posts or monuments marking the exterior boundaries thereof should be so placed as to include more ground in length than the law allows, such location would be void only as to the excess; but this can only be the rule where stakes or monuments are within such reasonable proximity to the place where the law requires them to be placed that they can be readily found or seen by a person attempting to trace the boundaries upon the ground; but when the stakes or monuments are at so great a distance from where the law requires they should be that a person attempting to trace the boundaries of the claim upon the ground could not readily find them, then such location is void altogether.

Which instruction the court refused; to which refusal the plaintiff in error excepted.

28.

The plaintiff in error now assigns the following error: That the testimony shows that the Stemwinder was the first location of the ground in dispute, both by its original and its amended notice of location.

29.

It was error in the court to hold that the amended location of the Stemwinder was not the only valid location that appeared in the case.

30.

It was error in the court to hold that there was no evidence that the corporation plaintiff in error made the amended location
379 of the Stemwinder mining claim, and to furthermore hold that the evidence was conclusive that the corporation did not make the location; which language and holding of the court the plaintiff in error now assigns as error.

31.

It was error in the court to hold that the 22nd instruction asked for by plaintiff had been given by the court, as the bill of exceptions and statement on motion for a new trial both certify the ruling by the judge that such instruction was refused.

S. S. BURDETT,
Washington, D. C.
FRANK GANAHL &
ALBERT HAGAN,
Att'ys for Plaintiff in Error.

Endorsed on cover: Idaho Territory supreme court. No. 815. The Stemwinder Mining Company, plaintiff in error, *vs.* The Emma & Last Chance Consolidated Mining Company *et al.* Filed August 8, 1889.

FILED
NOV 16 1892
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1892.

Term No., 62.

THE STEMWINDER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IDAHO TERRITORY.

Brief of W. B. Heyburn for the Defendants in Error.

W. B. HEYBURN,
Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1892.

Term No., 62.

THE STEMWINDER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IDAHO TERRITORY.

Brief of W. B. Heyburn for the Defendants in Error.

DEFENDANTS' STATEMENT OF FACTS.

It nowhere appears in the record of this case that the amount involved exceeds two thousand dollars, and the Court therefore has no jurisdiction and the writ of error should be dismissed.

This was an action brought under the provisions of section 2326 of the Revised Statutes of the United States to determine the question of the right of possession of an area of ground in conflict between plaintiff and defendants, the plaintiff claiming such area as a part of the location of the

Stemwinder mining claim. The defendants claimed the same as a part of the location of the Emma mining claim. Both claims purport to have been located upon the same day, to wit, the 17th of September, 1885, by the grantors of the present claimants. The location notice of the Emma will be found in the transcript on printed page 149 (through an error in printing the transcript it is indexed as being on page 40), and the location notice of the Stemwinder on printed page 112. Each of these location notices claims 1,500 feet in length along the lode and 300 feet on each side of the lode, and no more.

The plaintiff's brief is devoted to a discussion of the right of a locator to locate more than 1,500 in length or 300 feet on each side of the vein, and we therefore call the special attention of the Court to the fact that, while both parties staked on the ground in excess of the amount claimed, neither claimed more than the amount of ground they were entitled to under the law.

In December, 1886, an official survey was made of the Emma claim under order of the surveyor general, and permanent posts established within the limits of the claim described in the location notice and allowed by law, definitely and officially marking the boundaries of the Emma claim. (See Transcript, page 128.) In May, 1887, the lines of the Stemwinder were, for the first time, staked upon the ground, as now claimed, within the limits allowed by law.

Prior to the official staking of the Emma claim in December, 1886, the posts upon the ground marking the boundaries of the claim were, as shown upon the plat, at page 132, far outside of the limits allowed by law, which fact is explained by the testimony and by the opinion of the supreme court of Idaho on page 237 of the transcript, and the reason given is that because of the rugged mountains and the nature of the ground it was impracticable at that time to be more accurate in the staking.

It appears also that the original posts marking the bound-

aries of the Stemwinder claim were as far outside the limits allowed by law as were those of the Emma. This is shown by the plat at page 66 of the transcript. If we take the plaintiff's line of argument as our guide, his claim would be absolutely void by reason of having located nearly three times the width on each side of the vein allowed by law, but we do not take the position that the location was void by reason of this excessive staking as to the entire claim, but only as to the excess, which point we shall discuss further on in the brief.

The question submitted to the jury was as to the priority of these original locations, which both seem to have included the ground in controversy. There is a reference in the location notice of the Emma claim to the Stemwinder as one of its neighbors, and the defendants argue that it is conclusive evidence that the Stemwinder must have existed at the time of the location of the Emma, but this is fully explained in the testimony of John Smith, on page 146 and following. These facts were all submitted to the jury under the instructions of the court that the question to be determined was which of these parties, if either of them, made the first valid location, and the jury found that the Emma location was prior in point of time.

A question is raised upon an instruction of the court as to the right of a corporation to locate a mining claim, and error is assigned upon the instruction of the court in that particular, which instruction is found on page 27 of the transcript, being the seventh requested by the defendant. Since the trial of this case the Supreme Court of the United States, in the case of McKinley *vs.* Wheeler, 130 U. S., page 630, has decided that a corporation, all of whose members are citizens of the United States, may locate or join in the location of a mining claim. This principle was recognized by the supreme court of Idaho in passing upon this case, and they held that it not being claimed that the original location was made by a corporation that error on the part

of the trial court in this respect was not sufficient reason for reversing the case, as it was at the most only claimed that the corporation amended the original location, the question being between the two original locators. The statement contained in the plaintiff's brief that the amended location of the Stemwinder was made before the Emma had been properly staked is incorrect as a matter of fact, the amended location of the Stemwinder having been made many months after the official survey of the Emma claim for patent. We particularly direct the attention of the Court to this fact, as much of the brief of plaintiff in error is devoted to a consideration of it, and it is asserted several times therein that the amended location of the Stemwinder was made before the Emma location had ever been properly staked upon the ground. The statement of fact being untrue, the authorities and argument of plaintiff in error must pass out of consideration.

There was no question raised as to the right of the corporation, plaintiff, to own mining property in the Territory of Idaho under the act of March 3, 1887, and under the pleadings in the case it was not error for the court to refuse to receive testimony on that subject.

The statement contained in brief of plaintiff in error that it was admitted on the trial by Smith, the locator of the Emma, that the Emma claim was not staked or the notice posted until the 18th or 19th of September, 1885, is utterly without foundation. The reference to the transcript made by counsel in support of the assertion fails to bear it out. At no time during the trial did the defendants or any locator admit, either directly or by implication, that the location of the Emma claim was made at any other time than on the 17th of September, 1885.

With this statement of facts, in addition to those contained in the brief of plaintiff in error, we proceed to the consideration of the assignment of errors upon which the plaintiff in error relies.

ARGUMENT.

For convenience of discussion we will group the 1st, 2d, 3d, 4th, 5th, 26th, and 27th assignments of error, inasmuch as they all refer to the question of the length of the claim staked upon the ground by defendants in error and are based upon the proposition that a party who marks upon the ground any excess of the length or width allowed by the law acquires no rights by such marking.

Plaintiff in error relies almost entirely upon the decision of the supreme court of the Territory of Montana in the case of Hauswirt *vs.* Butcher, 4th Montana, 306, and the case of Leggatt *vs.* Stewart, 2d Pac. Rep., 320.

The Supreme Court of the United States, in the case of The Richmond Mining Company *vs.* Rose, 114 U. S., 576, holds that a claim staked in excess of the length allowed by law is void only as to the excess. The case of Atkins *vs.* Hendrie, 1st Idaho, 100, holds the same doctrine. The same principle is laid down in the case of Tarbet *vs.* Flagstaff Mining Company, 98 U. S., 463. The same principle is involved in the decisions in the case of The Iron Silver Mining Company *vs.* The Elgin Mining and Smelting Company *et al.*, 118 U. S., 196, and also in the case of The Argentine Mining Company *vs.* The Terrible Mining Company, 122 U. S., 478, where the court holds that a claim located across the vein holds to the extent of 300 feet on each side of the middle of the vein, notwithstanding the stakes are 1,500 feet apart.

The supreme court of the State of Idaho, in passing upon the case at bar, holds that the location was void only as to the excess.

It appears from an examination of the record and the plat contained on page 132 that the ground in controversy was no part of the excess staked, but covered the actual discovery of the Emma location. It cannot be claimed that

the excessive staking misled the plaintiff in error or that the conflict of location was the result of a failure on the part of the plaintiff in error to confine the eastern boundary line of the Emma claim, and it does appear that five months prior to the making of the location, which plaintiff in error calls an amended location of the Stemwinder, Mr. Trask, a United States deputy mineral surveyor, made an official survey of the Emma claim and planted the official posts of such survey within the limits of the lode by law, as shown on the plat, page 132 of the transcript; and at the time Mr. Trask made such official survey the Stemwinder claim was staked upon the ground in an easterly and westerly direction about 2,000 feet in length and considerably in excess of the width allowed by law. This will appear both from the map, on page 66, in the transcript and the testimony of X. S. Burke, on pages 66 and 67, and it was not until the 23d of May, 1887, that any change was made in the boundaries of the Stemwinder as originally located.

The two claims—the Emma and the Stemwinder—stand side by side parallel one to the other; one of them 2,000 feet in length and the other from 2,100 feet to 2,300 feet in length, from September, 1885, until the first change was made in the location of the Emma boundaries by the official survey in December, 1886, and in May, 1887, the Stemwinder concluded to readjust its boundaries by a definite survey, and carved out of its original location the figure as shown in the plat on page 66 of the transcript.

The official survey made by Mr. Trask in December, 1886, was approved by the surveyor general of Idaho, and on the 7th day of May, 1887, the defendants in error had applied for a United States patent for the Emma claim based upon the survey of Mr. Trask. At the time of this application for patent the Stemwinder mining claim still remained marked upon the ground as originally, no attempt having been made to readjust its lines.

Sixteen days after the application for patent of the Emma

claim had been filed in the land office the Stemwinder com menced to readjust its lines by carving out of its origina location the piece of ground indicated upon the plat, at page 66 of the transcript.

We submit that it cannot be heard to criticise the original location of the Emma claim under those circumstances.

The 2d assignment of error was not applicable to the facts as they appear in the record. The subsequent survey of the claim was not after a readjustment of the boundaries, but was an official survey and established the boundaries, as required by such survey, and the court was right in refusing to give the instruction.

The 3d assignment of error considered under this group was really as to the admission of the location notice of the Emma claim in evidence. The location notice claimed only the amount of ground allowed by law, and its sufficiency will be considered more particularly under the 16th assignment of error.

The 6th assignment of error is based upon the refusal of the court to give the 16th instruction asked for by the plaintiff in error, which is found on pages 22 and 23 of the transcript.

It will be found that the court gave this instruction in substance in the 2d, 17th, and 22d instructions given.

The 7th assignment of error is based upon the refusal of the court to instruct the jury "That an amended or additional notice of location upon the same ground made with intent to remedy the defects in the original and filed according to the statute was admissible in evidence and served the same purpose as the original notice of location and relates back to the first location of the claim."

The court gave this instruction, in substance, in the 13th and 14th instructions given to the jury. See page 22 of the transcript.

The 8th assignment in error is passed upon in the 6th instruction given at the request of the defendants. Found on page 27 of the transcript.

the excessive staking misled the plaintiff in error or that the conflict of location was the result of a failure on the part of the plaintiff in error to confine the eastern boundary line of the Emma claim, and it does appear that five months prior to the making of the location, which plaintiff in error calls an amended location of the Stemwinder, Mr. Trask, a United States deputy mineral surveyor, made an official survey of the Emma claim and planted the official posts of such survey within the limits of the lode by law, as shown on the plat, page 132 of the transcript; and at the time Mr. Trask made such official survey the Stemwinder claim was staked upon the ground in an easterly and westerly direction about 2,000 feet in length and considerably in excess of the width allowed by law. This will appear both from the map, on page 66, in the transcript and the testimony of X. S. Burke, on pages 66 and 67, and it was not until the 23d of May, 1887, that any change was made in the boundaries of the Stemwinder as originally located.

The two claims—the Emma and the Stemwinder—stand side by side parallel one to the other; one of them 2,000 feet in length and the other from 2,100 feet to 2,300 feet in length, from September, 1885, until the first change was made in the location of the Emma boundaries by the official survey in December, 1886, and in May, 1887, the Stemwinder concluded to readjust its boundaries by a definite survey, and carved out of its original location the figure as shown in the plat on page 66 of the transcript.

The official survey made by Mr. Trask in December, 1886, was approved by the surveyor general of Idaho, and on the 7th day of May, 1887, the defendants in error had applied for a United States patent for the Emma claim based upon the survey of Mr. Trask. At the time of this application for patent the Stemwinder mining claim still remained marked upon the ground as originally, no attempt having been made to readjust its lines.

Sixteen days after the application for patent of the Emma

claim had been filed in the land office the Stemwinder commenced to readjust its lines by carving out of its origina location the piece of ground indicated upon the plat, at page 66 of the transcript.

We submit that it cannot be heard to criticise the original location of the Emma claim under those circumstances.

The 2d assignment of error was not applicable to the facts as they appear in the record. The subsequent survey of the claim was not after a readjustment of the boundaries, but was an official survey and established the boundaries, as required by such survey, and the court was right in refusing to give the instruction.

The 3d assignment of error considered under this group was really as to the admission of the location notice of the Emma claim in evidence. The location notice claimed only the amount of ground allowed by law, and its sufficiency will be considered more particularly under the 16th assignment of error.

The 6th assignment of error is based upon the refusal of the court to give the 16th instruction asked for by the plaintiff in error, which is found on pages 22 and 23 of the transcript.

It will be found that the court gave this instruction in substance in the 2d, 17th, and 22d instructions given.

The 7th assignment of error is based upon the refusal of the court to instruct the jury "That an amended or additional notice of location upon the same ground made with intent to remedy the defects in the original and filed according to the statute was admissible in evidence and served the same purpose as the original notice of location and relates back to the first location of the claim."

The court gave this instruction, in substance, in the 13th and 14th instructions given to the jury. See page 22 of the transcript.

The 8th assignment in error is passed upon in the 6th instruction given at the request of the defendants. Found on page 27 of the transcript.

We insist that the law was correctly stated in this instruction. If a party locates a new discovery and establishes new boundaries to a claim running in an entirely different direction from a location that he may have made upon the ground, it amounts to a relocation of his own claim, and his rights are based upon such relocation.

It will be seen by the diagram on page 66 of the transcript that the Stemwinder claim claims its length crosswise of the original location, and the discovery point, as shown on the diagram of the official survey, page 116, shows that the discovery point is not at the same place as was claimed in the original location, but, according to the testimony of Mr. Carlin, on page 164 of the transcript, the locator of the Stemwinder moved his point of location 80 feet to the north, so that the facts were sufficiently before the jury to justify the court in giving the instruction mentioned in the 8th assignment of error.

The 9th assignment of error is his instruction to the court that the Stemwinder Mining Company was not authorized to make a mining location.

The supreme court of Idaho, in passing upon this point, says: "Without deciding whether this was error or not we can safely say that it was not such an error in such case as would justify the court in reversing the judgment. There was no evidence that the corporation made the location; on the contrary, the evidence was conclusive that the corporation did not make the location, and the charge, even though error, could not in any way have injured the plaintiff. Besides this the defendant's claim was in precisely the same condition, and the evidence conclusively shows that the defendant did not make the location, but stood in the same position that the plaintiff did, namely, to purchase the claim from citizens who had made locations. The charge of the court being perfectly clear as to the real facts of the case, and the case being properly submitted to the jury, to charge as the court did, under all the circumstances, was not error,

as such charge could not in any manner have injured any one."

We think that whatever the law may be on the subject, and since the decision of this Court in the case of McKinley *v.* Wheeler, 130 U. S., 630, we are bound to concede that a corporation properly organized may make a mining location, but that it can affect the judgment in this case we do not concede, for the reason that it is not claimed that a corporation did make the location.

The court charged the jury, of its own motion, as follows (page 41 of the transcript):

"I have stated the law to you very plainly as it seems to be as to what constitutes a valid location, and I shall further charge you this, that there is really but one question in this case. The whole case is practically limited to that question—that is, who first made a valid location on this ground. That is really the whole question stripped of the evidence and stripped of all the facts of the case. Now, to determine that point you must go into all the evidence you have heard, reconcile it if you can, and ascertain, if you can, who, in your judgment, to the best of your belief, first located, made a valid location upon that ground. If you find that the plaintiff made the first valid location the plaintiff is prior in point of time, and whatever may be all the facts of this case, I do not care what they are, the plaintiff is entitled to a verdict at your hands. If you find, however, that the defendant made the first valid location, then the defendant is entitled to a verdict at your hands. I state that to you so as to simplify the case and bring it down to the direct point in issue. Of course I do not take from you the facts in the case; I do not take from you the evidence that has been given before you, but on those facts you will find a verdict, bearing in mind your duty as jurors. You have a right in this case to find that neither party is entitled to a verdict, that the property is really in the United States, and if you come to an honest conclusion to that effect you will have to so alter the form of this form of verdict given you as to accord with that conclusion."

This is made the subject of the 10th assignment of error. We submit that no more correct statement of the jury's duty, in connection with the law given on pages 31, 32, 33, 34, 39, and 40 of the transcript, could have been made by the court. The whole question turns upon a question of fact, namely, which, if either, of the parties, plaintiff or defendant, made the first valid location on the ground in controversy, and what constituted a valid location was clearly and expressly stated to the jury by the court.

The same argument may be applied to the 11th assignment of error.

The 12th assignment of error, we submit, is without merit for the reason that it is a well-established principle that the point of discovery is to be taken as the center of the vein of discovery for the purpose of measuring the width of a claim, and, in any event, the Stemwinder claim, according to the plaintiff, is located along the course of the ledge, and they could claim nothing in a northerly direction by virtue of the principle that they asked the court to adopt.

The 13th assignment of error goes to the same principle as is involved in the 12th, and we find in the transcript, on page 31 and on page 42, that the court fully and correctly instructed the jury as to the right of the locator to ground on each side of his point of discovery.

The plaintiff attempted to get the court to instruct the jury that a party might make a discovery upon a ledge at one point and afterwards, in a contest with his neighbor, claim that he did not measure the width or length of his claim to that point at which he placed his notice, but from some other undetermined point of which his neighbor could have no certain knowledge, and that might be shifted at the caprice of the locator. The court refused to adopt any such rule, and we submit that it was not error.

The 14th assignment of error is based upon the testimony contained upon pages 130 and 131 of the transcript. It will appear from such testimony that the assignment of error is

not well taken for the reason that the court did not allow Mr. Trask to testify to the compromise stake as being a line or being pointed out as a line. The court sustained the counsel's objection to the witness stating that the monument of rocks was pointed out to him as a compromise line, as appears at the top of page 131 of the transcript.

It will appear from the record that the only time a witness was allowed to testify as to the compromise stake was for the purpose of determining a point of measurement in the testimony of Mr. Carlin.

We submit that it would not have been error had the court allowed the testimony.

The 15th assignment of error goes more directly to the testimony of Carlin, as to the measurement made to the compromise stake, which appears on the plat at page 132.

The point was used by Carlin to identify a measurement made by himself and the owners of the Stemwinder claim to determine where a point 300 feet from the discovery of the Stemwinder would fall. The first testimony on this subject appears in the transcript, on pages 144 and 145, which shows that the question objected to by plaintiff remained unanswered, but on pages 160 and 161 it will be seen that the court allowed the testimony of Carlin, as to the measurement from the point of discovery of the Stemwinder, a distance of 300 feet, to determine the extent of ground to which the Stemwinder was entitled on this side of its discovery, and that this measurement was made by the claimants of the Emma and the Stemwinder jointly, and the monument of stones marked on the plat at page 132 as "compromise stake" was to fix the line between the two claims.

It will be remembered that at this time the Stemwinder claim lay practically alongside of and parallel with the Emma, as indicated by the plat at page 66. It was competent to show this fact.

The 16th assignment of error is based upon the admission of the location notice of the Emma Lode claim. Ob-

jected to on the grounds that it did not contain such a reference to natural objects or permanent monuments as is required by statute.

A reference contained in the notice of location is as follows: "On Iron creek, about two and a half miles in a southerly direction from Jackass prairie, and being northerly of and adjoining the Stemwinder."

In Harmer *vs.* The Garfield Mining Company, 130 U. S., 299, it is held that a description "about 1,500 feet south of Vaughn Little Jennie mine" is sufficient.

We think that this disposes of the point raised on this assignment of error.

The consideration of the 17th assignment of error comes under the same line of reasoning and authority as the 16th.

The 18th assignment has already been considered in discussing the 8th.

The 19th and 20th assignments of error have already been considered in discussing the 14th and 15th.

The 21st assignment of error is based upon the refusal of the court to allow plaintiff to enquire of X. S. Burke as to the width of the vein. The testimony will be found on page 173, and we submit will sustain the ruling of the court.

The 22d assignment of error seems to be a general objection to the result of the trial. The jury found the facts involved in the consideration of the 1st paragraph of the assignment of error, and the 2d paragraph of the assignment of error has been discussed in considering the 1st and 2d assignments of error.

The 23d assignment of error is based upon the instruction of the court, in substance, that under the law a locator was not entitled to more than 300 feet on each side of the vein at his point of discovery. This we understand to be the law as is established by statute and decision.

The 24th assignment of error has been considered in discussing the first and second.

The 25th assignment of error is without point, for the

reason that the court charged the jury on every proposition contained within the assignment of error in its 1st and 2d instructions, contained on pages 31 and 32 of the transcript.

We have already considered the 26th and 27th assignments of error in discussing the first and second.

The 28th assignment of error is based upon the proposition that the evidence does not sustain the verdict. That question having been left to the jury, we submit that it will not be reopened on this record.

The 29th assignment of error is inconsistent with the case presented by the plaintiff. To have given the instruction asked it would have been equivalent to striking out all of the testimony of the plaintiff as to the location of the Stemwinder, and would have required the court to hold that a location admitted to be made on the 23d day of May, 1887, should have priority over a claim upon which application for patent had been made upon an approved official survey on the 7th of May, 1887. We do not believe that this assignment of error requires further consideration.

The 30th assignment of error is based upon the conclusion of the supreme court of Idaho that the title of the plaintiff did not rest upon the amended location, but upon the original. We have discussed this proposition in considering the 9th assignment of error.

The 31st assignment of error is best disposed of by reference to the transcript, on page 24, in the last paragraph, and ending at the top of page 25, in which the judge, over his initials, says that he did give the instruction except as to the portion contained in brackets.

The whole question in this case was one of fact, namely, which one of these two parties, if either of them, first made a valid location of the ground in controversy, and the court, in the 15th instruction, given on page 22 of the transcript, so charges the jury.

It will be observed that the discovery point of the Emma claim is on the ground in controversy; it will also be ob-

served that these parties, recognizing the fact that there was a conflict between their claims, endeavored to adjust it, and that the Emma claimants respected this adjustment, whether it was legal or not, by withdrawing their line to the point agreed upon. This will appear from an inspection of the map at page 122.

The testimony of Michael Carlin, one of the locators of the claim, page 136, establishes beyond a doubt that the Emma location was made on the 17th of September, 1885; that it was made prior to the time when Devine, locator of the Stemwinder, posted the notice upon that claim. John L. Smith, another one of the locators, testifies, on page 146 of the transcript, that the location of the Emma was made on the 17th of September and prior to that of the Stemwinder. He states that Devine wrote the notice of the Stemwinder at a point about two and a half miles distant from the claim and that they there agreed upon the name of these locations. His testimony shows that he first directed Devine's attention to the ground which he afterwards located; that by reason of his assistance and direction Devine obtained the ground which he located as the Stemwinder, and that he, knowing that Devine was going to call the claim the Stemwinder and that it was to lie alongside of the ground that he had selected as the Emma, referred in the notice of the Emma to the Stemwinder claim.

All these facts were submitted to the jury under the instruction of the court and the jury found for the defendants, the owners of the Emma claim.

We submit that the judgment should be affirmed.

Respectfully submitted.

W. B. HEYBURN,
Counsel for Defendants in Error.

Office Supreme Court U. S.
FILED.
NOV 11 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1892.

THE STEMWINDER MINING CO.,
PLAINTIFF IN ERROR,

v.

THE EMMA AND LAST CHANCE CONSOLIDATED MINING CO.,
DEFENDANT IN ERROR.

No. 62.

Error to the Supreme Court of the Territory of Idaho.

BRIEF FOR THE PLAINTIFF IN ERROR.

ALBERT HAGAN,
S. S. BURDETT,
Attorneys for the Plaintiff in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE STEMWINDER MINING COMPANY,
PLAINTIFF IN ERROR,

v.

THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY ET AL.,
DEFENDANTS IN ERROR.

No. 62.

Error to the Supreme Court of the Territory of Idaho.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

This is an action brought in the district court of the first judicial district of Shoshone county, Idaho, under the provisions of secs. 2325 and 2326 R. S. of the United States, upon an adverse claim filed by the appellant, The

Stemwinder Mining Company, a corporation organized under the laws of the State of Oregon, the owner of The Stemwinder mining claim, Yreka mining district, Shoshone county, Idaho, against the application for a patent by the Emma and Last Chance Consolidated Mining Company, the appellee herein, for the mine known in said district as the Emma mine.

The Record shows that the Stemwinder mining claim was located September 17, 1885, by one S. R. Devine (Rec. 110), who thereafter, on March 10, 1887, sold and conveyed the same to the Stemwinder Mining Company, the plaintiff in error (Rec. 120), and the said company having gone into possession thereof at the date of said deed, in prosecuting the work of development thereon, discovered that the vein located as the Stemwinder ran through and across the claim as located by Devine, and also that the said location by Devine was in excess in width on each side of the vein so located, as allowed by law, and thereupon the appellant company, on May 23, 1887, filed and posted upon said premises an amended notice of location, more clearly and distinctly marking and defining the boundaries of the claim and confining the exterior limits of the claim so located by the amended location to not more than three hundred (300) feet on each side of the vein as it was discovered to run. This amended location was, however, upon the ground contained in the original location and within the exterior boundaries of the original claim as located by Devine (Rec. 68). The original location notice of the Stemwinder is in the Record (p. 110). The amended notice of location thereof appears in Rec. 112.

The Emma mining claim was located about the same time as the Stemwinder mining claim. The notice of location thereof also bears date of September 17, 1885

(Rec. 149). There never was an amended location made of that claim. On May 6, 1887, the owners of the Emma mine filed an application for a patent therefor in the land office at Cœur d'Alene City, Idaho. Within the time required by law the Stemwinder Mining Company filed its adverse claim and commenced this action.

The complaint, after alleging the application for patent, the filing of the adverse claim, and the ownership in the plaintiff since March 11, 1887, of the mining claim known as the Stemwinder, avers that the defendants, claiming to be the owners of an adjacent mining claim called the Emma mine, on December 15, 1886, wrongfully caused said Emma mining claim to be so surveyed as to overlap and include a portion of said Stemwinder mining claim, the part so wrongfully overlapped and included being particularly described and set out and amounting to 1.38 acres.

The judgment prayed for is that the plaintiff be declared the owner and entitled to the possession of the said described area in conflict, and that the defendants have no title or right of possession to the said area so in conflict or the lode therein (Rec. 1–4).

The answer denies in general the ownership or possession by plaintiff of any of the ground described in the complaint as the Stemwinder mining claim. It alleges that the parcel of ground described by the complaint as in conflict is a part of the Emma and the property of the defendants.

The answer thereupon sets up the location of the Emma mining claim alleged to have been made September 17, 1885, the application for a patent therefor, the ultimate sale by the locators and intervening vendees of the tract located to the Emma and Last Chance Consolidated Mining Company, a corporation organized under the laws

of the State of Oregon, and avers that the Stemwinder mining claim, as claimed by plaintiff, was never located according to law, if at all, until long subsequent to the location of the Emma, and that plaintiff is not and never has been in possession of the area in conflict.

Certain maps were offered in evidence showing the relative positions of the Emma claim as applied for, and of the Stemwinder as described in the amended notice of location. There was no controversy as to the correctness of these maps. The conflict between the two claims is shown on the map (Exhibit B) found between pages 66 and 67 of the Record.

The description of the ground applied for as the Emma lode as surveyed for patent, and of the ground of the Emma as originally located, and of the Stemwinder location as described in the amended notice of location, is shown on the map, Exhibit C, at p. 132 of the Record.

The official plat of the survey of the Stemwinder approved by the surveyor-general of Idaho showing that claim and location and the Emma and Last Chance (an adjoining claim) is at p. 116 of the Record.

The course and strike of the vein or lode is shown by the red line running northerly and southerly through the centre of the Stemwinder, which is marked "centre of lode" (Record, p. 116).

The area in conflict is that portion of the north end of the Stemwinder which lies within and between the south side line and the west end line of the Emma as surveyed for patent and the north end line and east side line of the Stemwinder. The course and strike of the vein as laid down on the map (Record, p. 116) is shown by the testimony of X. S. Burke, the engineer who made the survey evidenced by the map (Rec. 69), also testimony of Loring, engineer (p. 63).

There was a verdict and judgment for the defendants in error. A motion for a new trial was made and by the court overruled (Rec. 229). An appeal was taken to the supreme court of the then Territory of Idaho, where the judgment of the court below was affirmed (Rec. 235). This writ of error was thereupon sued out. The opinion of said supreme court will be found at p. 235 of the Record.

The errors relied on in this Court for the reversal of the judgment below (Record, 244 to 251, inclusive) are as follows:

"1. The court erred in refusing to give the instruction asked for by plaintiff in error 'that the locator of a mining claim must distinctly mark and define the location upon the ground by proper stakes and monuments so that the boundaries thereof can be readily traced, and that if the Emma locators placed stakes at a distance of 2,300 feet apart to define the length of their claim that the notice of location does not conform thereto, and that a location made so largely in excess of that allowed by law is of itself void and of no force or effect.'

"2. And also the court erred in the same instruction by refusing to instruct the jury 'that a subsequent survey of such claim without a readjustment of the boundaries and without any effort to mark or define the same according to law will not benefit the locators or remedy the defects of the original location.'

"3. The court erred in refusing to instruct the jury as requested by plaintiff 'that a claimant who has not erected his boundary posts as the law requires will not be permitted to show the courses and distances of a recorded location that does not conform thereto where the rights of intervening locators without notice will be prejudiced.'

"4. The court erred in refusing to instruct the jury as asked for by plaintiff 'that a mining claim under the law cannot exceed 1,500 feet in length along the vein or lode and 300 feet in width on each side of the vein or

lode, and the stakes marking the boundaries thereof must be placed at the points described by law or near enough thereto that any person honestly seeking to trace the boundaries of such claim might readily find them, and if they were not so placed the location was void.'

"5. The court erred in refusing the instruction asked for by plaintiff 'that if the jury find from the evidence that the boundary stakes marking the east end of the Emma claim were placed at such a distance from where the law required them to be placed that a person seeking to trace the boundaries of said claim could not readily have found the same, that they could not find for the defendant.'

"6. The court erred in refusing to instruct the jury as asked for by plaintiff 'that if they find from the evidence that plaintiff had established its prior right by a proof of the discovery of its grantor in and to the Stemwinder mining claim, worked and possessed the same in pursuance of said notice of location, disclosing mineral in place, posting a notice and marking the surface boundaries, and filing the original notice of location, and that thereafter, after the discovery of the course of the vein, the plaintiff and its grantors had ascertained the true strike and course of the vein as located, and had filed an amended location thereof in order to conform the same to the course of the vein, and if they further find that the Emma location was void, that they never amended their location or marked or defined the ground in the said Emma location in pursuance of the calls of the notice of the same, that they should find for the plaintiff.'

"7. And the court erred in further refusing to instruct the jury 'that an amended or additional notice of location upon the same ground, made with intent to remedy the defects in the original, and filed according to the statute, was admissible in evidence, and served the same purpose as the original notice of location, and relates back to the first location of the claim.'

"8. And the court further erred in instructing the jury 'that if they found from the evidence that the discovery point of the Stemwinder lode was changed a distance of

eighty (80) feet or thereabouts, and the amended location of the Stemwinder adopted the point of discovery as so changed and located at right angles to the course of the location as originally claimed, that this would be such a material change of the original location as to amount practically to a relocation.'

"9. The court erred in instructing the jury, at the request of the defendant, 'that the Stemwinder Mining Company is a corporation organized under the laws of the State of Oregon, and no such corporation is entitled to the privilege of making a mineral location of lands belonging to the United States.'

"10. The court erred in instructing the jury 'that the real point at issue in this case was who made the first valid location according to law, and that whoever made the first valid location had the right in point of time and was entitled to a verdict,' and in further instructing the jury that that instruction did not govern all the other instructions, but only in part.

"11. And the court further erred in saying to the jury and instructing them 'that the Stemwinder may have the prior valid location, but if it did not lawfully include ground in dispute, then the instructions as to priority of location would not apply.'

"12. The court erred in refusing to instruct the jury, upon its second return into court, 'that a locator may locate 300 feet in width on each side of the centre of the vein, and the question as to where the centre of the vein is at the surface is a question of fact for the jury, and in the absence of proof as to where the centre of the vein is that it would be at the point of discovery, but if the proof showed the centre of the vein at a different point from the discovery that the locator would hold 300 feet in width on each side of the centre of the vein, as shown in the evidence, within the boundaries of the claim as originally marked upon the ground.'

"13. The court erred in refusing to instruct the jury 'that if they found that the locator of the Stemwinder located upon the vein and the location included less than 1,500 feet on the vein, and the vein was found to cross the

location, then, if the location is found to be so made, the locator could take the vein to the limits of his side lines as so located, wherever it runs, and that 300 feet on each side of the vein means a measurement from the centre of the vein from any point within the location so made until it passes out of the exterior boundaries of the location.'

"14. The court erred in allowing the witness George R. Trask to testify concerning any compromise line or point between the Stemwinder and the Emma mining claim, or as to any conversations about the same, or any admissions upon the part of Sandy Devine or any of the owners or locators of the Stemwinder mining claim.

"15. The court further erred in allowing the witness Mike Carlin to testify or give evidence in regard to any compromise line as measured, or of his measuring any point on the Stemwinder to another point on the alleged Emma mining claim, or testifying in any manner that the locators of the Emma had any controversy with Devine and Jim Smith, the supposed locators of the Stemwinder mining claim, that the controversy had been settled in any manner, or allowing the said witness to testify anything about what he, the witness, and the said Devine and Smith or any one did toward settling the controversy, or any controversy, as to the lines of the Emma and Stemwinder mining claims.

"16. The court erred in admitting in testimony and having read to the jury the notice of location of the Emma Lode mining claim as recorded, for the reason that such notice does not contain such a description of the premises sought to be located by reference to natural objects or permanent monuments as to identify the claim, and that the same is void for uncertainty, vague, and indefinite, and does not conform to the description of the ground as it was staked out, and does not conform to the requirements of the mining laws, either national or territorial.

"17. The court erred in overruling the objection of the plaintiff to the following question asked the witness Michael Carlin after he had testified that Sandy Devine had pointed out to him his notice on the Stemwinder, as follows, to wit. 'Did you ever measure a distance from that point of

discovery where the notice was posted in a direction practically at right angles with the claim as it was claimed at that time?'

"18. The court erred in allowing the following question to be asked the witness Carlin and answered by him, to wit: 'Do you know about any change being made in the position of the discovery post or notice of the Stemwinder after the location of the Emma lode? State what you know about it.'

"19. The court erred in allowing the said witness Trask to be asked and to answer the following question: 'What does that (the black spot marked on the map) indicate now with reference to your testimony?' 'Ans. Compromise stake.'

"20. The court erred in allowing the witness Trask to be asked and to answer the following question: 'You may state whether or not the stone monument to which you have testified was ever pointed out to you by Michael Carlin.'

"21. The court erred in sustaining the objection of the defendant to the question asked the witness X. S. Burke, who, after testifying that he knew very nearly where the vein run with reference to the map and that he knew where the discovery of the Stemwinder was, was asked the following question: 'How wide is the vein there east of the discovery?'

* * * * * * *

"23. The court erred in instructing the jury 'that if they found from the evidence that S. R. Devine included more than 300 feet within his stakes on the northerly side of the point of discovery of the Stemwinder mining claim at the time the notice was posted that his location was void as to the excess, and that if such excess was originally included within the boundaries of the Emma location it belonged to the Emma location.'

"24. The plaintiff further assigns as error herein that the Emma claim as located and staked was void by reason of excess in such staking and locating.

"25. The court erred in refusing to give the instruction asked for by the plaintiff in error in the court below in

which the court was asked to instruct the jury 'that under the law four things were necessary to perfect a location: 1st, the discovery of a vein or lode within the surface located; 2d, the posting of a notice at the point of discovery; 3d, marking and defining the boundaries of the claim so located; and 4th, recording a location notice containing a description of the claim, the names of the locators, and the date of the location.'

"26. It was error in the court below to refuse to give the following instructions asked for by the plaintiff in error herein, to wit: Now if you find from the evidence that the location of the Emma lode was not so marked upon the ground that the boundaries thereof could be readily traced at the time of the original location thereof, and that the locators thereof, or those claiming under them, have not since made or attempted to amend such location or to relocate the same, then such location was and is void, and in that case it will be unnecessary for you to inquire as to the priority of the respective locations in controversy herein.

"27. It was error in the court below to refuse the 22d instruction asked for by the plaintiff in error—

"If in marking the location of a mining claim upon the ground the posts or monuments marking the exterior boundaries thereof should be so placed as to include more ground in length than the law allows, such location would be void only as to the excess; but this can only be the rule where stakes or monuments are within such reasonable proximity to the place where the law requires them to be placed that they can be readily found or seen by a person attempting to trace the boundaries upon the ground; but when the stakes or monuments are at so great a distance from where the law requires they should be that a person attempting to trace the boundaries of the claim upon the ground could not readily find them, then such location is void altogether.

"28. The plaintiff in error now assigns the following error: That the testimony shows that the Stemwinder was the first location of the gound in dispute, both by its original and its amended notice of location.

"29. It was error in the court to hold that the amended

location of the Stemwinder was not the only valid location that appeared in the case.

"30. It was error in the court to hold that there was no evidence that the corporation plaintiff in error made the amended location of the Stemwinder mining claim, and to furthermore hold that the evidence was conclusive that the corporation did not make the location.

"31. It was error in the court to hold that the 22d instruction asked for by plaintiff had been given by the court, as the bill of exceptions and statement on motion for a new trial both certify the ruling by the judge that such instruction was refused."

During the trial defendant offered some evidence as to a pretended compromise line on the part of Devine and others, to which plaintiff in error objected (Rec. 44–45). Also, during the trial, plaintiff in error (Rec. 47–48) offered to prove and did prove that all the stockholders of the plaintiff in error were citizens of the United States, which the court on, motion, struck out (Rec. 46).

ARGUMENT.

I.

The specifications of error numbered 1, 2, 3, 4, 5, 16, 23, 24, 26, 27, and 31 relate to the same subject. They are numbered separately for the reason that they appear in separate instructions, but will be treated altogether under one heading as addressed to the point that the Emma claim, as located and staked, is void by reason of excess, and that proposition carries with it the further one that the Emma notice of location itself is void inasmuch as it does not describe the land and premises really sought to be located.

The public mineral lands can be located and acquired by citizens by compliance with the laws of the United States and in no other manner. The State or Territory within which such lands lie may supplement the national statutes by regulations not inconsistent therewith and such regulations are to be observed.

In Streppy *v.* Stark (5 Pac. Rep. 114, 7th Colo. 618) the court lays down what is generally considered to be the true rule of appropriating a mining claim under the laws of Congress and the local laws of a State or Territory.

By section 2320 of the Revised Statutes of the United States, a mining claim located after the 10th of May, 1872, may equal but shall not *exceed* 1,500 feet in length along the vein or lode, and no claim can extend more than 300 feet on each side of the middle of the vein at the surface. Under the laws of Idaho a location is made, first, by the discovery of the vein; second, the posting of a notice at the point of discovery, giving the name of the lode, the the name of the locator, and date of the location; third, marking and defining the surface boundaries of the claim by proper posts in the manner pointed out by the statutes; fourth, making and recording a location notice containing the name and the description of the lode, the name of the locator, and the date of the location.

Sections 3100 and 3101 of the Revised Statutes of Idaho, are as follows:

> SECTION 3100. Mining claims hereafter located upon veins or lodes of quartz, or other rock in place bearing any of the precious metals, or other valuable deposits mentioned in section 2320 of the Revised Statutes of the United States, may extend to three hundred feet on each side of the middle of the vein or lode: *Provided*, That when the locators have set the stakes, posts, or monuments described in the

next section, to indicate the line of the vein, ledge, or lode, such stakes, posts, or monuments must be taken for the purposes of said location to mark correctly the line thereof, and such line must not be afterwards changed so as to affect rights acquired or interfere with any locations made subsequent thereto.

SECTION 3101. The locator of any lode mining claim must, at the time of making the location, place a substantial stake or post, not less than four inches square or in diameter, at each end of the ground claimed, and as near as practicable along the course or line of the vein or ledge, and also a similar stake or post at each corner of the location. Such stakes or posts must be at least four feet high above the surface, and must each be marked distinctly with the name of the claim. The notice of location hereinafter mentioned, must be conspicuously attached to one of said centre end posts, so that the same may be easily read; or it must be conspicuously posted in like manner at the point of discovery and prospecting work on the claim. Where stakes or posts cannot be conveniently had, well-built monuments of stone, of the like height above the surface, answer the purpose of stakes or posts, but the notice must be so placed on the side of such monument as to be readily seen.

A copy of the location notice of the Emma is attached to the answer (Rec. 11 and 12, also page 49). By the terms of that location the claim extended in length 1,000 feet east and 500 feet west from the discovery point, which is said to be 500 feet from the westerly end line. Said notice also states that the exterior boundaries of the claim "were distinctly marked by reference to some natural objects or permanent monuments;" the location notice also says that the Emma claim is described as being north of and adjoining the Stemwinder mining claim. Therefore, when we have ascertained the location of the discovery point we then can gather the extent of the location so far as the

notice is concerned. Upon inspection of the map of the defendant in error (Rec. 132), as also the official map of the Stemwinder lode claim as approved (Rec. 116), we find that the respondents are describing three distinct and different tracts of land as one mining claim. It will be seen by reference to the map and the testimony of George R. Trask, the surveyor, who surveyed the Emma claim for patent, that the witness says that the north line as shown on the map dotted is 2,340 feet in length and the south dotted line is 1,965 feet in length (Rec.133). Also by the same witness it is ascertained that the distance from the discovery point as now indicated on the map to corner No. 1, of the same survey, is 1,215 feet (Rec. 135). The survey of the claim for patent, therefore, is 1,215 feet on one side of the discovery and 272 feet on the other (Rec. 135). It also appears from the testimony of Burke that the distance between the Emma and the Stemwinder discoveries is about 280 feet (Rec. 173). It also appears from an actual survey by the surveyor, Burke, that the original location of the Stemwinder and Emma were made across the vein; that the trend or strike of the vein runs along about the centre of the amended location; the apex is along the line of works (Rec. 69), thus the ground actually staked by the Emma was 2,340 feet in length by about 900 feet in width; in other words, the Emma was staked 840 feet in excess of the notice on the easterly side, and in excess 465 feet on the westerly side. Plaintiff in error claimed that this was such an excess on the face of it that it would prevent the boundaries of the location from being readily or easily traced, and that it is not a compliance with the acts of Congress or the laws of Idaho.

It will further be observed by reference to the map of the claim as now applied for under the name of the Emma

that the discovery point is 1,215 feet from the easterly end line and 273 feet from the westerly end line, and, as shown by the testimony and maps already referred to, that the vein runs almost north and south, and that the Emma location is surveyed almost east and west, and that thus another cardinal rule of mining law has been violated. The owner of the Emma, therefore, seeks a patent to the ground in excess of 300 feet on each side of its vein. Although the court had its attention directed to this fact repeatedly, it never by instruction or ruling passed upon the question as to whether the Emma as surveyed for a patent presented a tract of ground with reference to its vein that the Government would recognize as a valid or existing survey at all. Such a location as the Emma certainly cannot be valid under the laws of Congress or the territorial law. The excess is so great as to show an entire and absolute want of good faith in the original location; such an excess is tantamount to no marking at all. To uphold such a location is practically to nullify the law relative to marking the boundaries.

Another fact is very important also—that there has never been an attempt made upon the part of the Emma owners to amend their location or their staking, and therefore the instruction referred to in the 5th specification of errors should have been given.

We will briefly review the cases that have been decided upon this point. The only case where the question has ever been before this Court, even incidentally, is that of the Richmond Mining Company *v.* Rose (114 U. S. 576). We submit that that case does not apply to the question now under consideration, nor does it sustain the defendant in error in its position, or the court below in its instructions. The court below certainly erred in refusing to submit to the jury the question as to whether or not the Emma loca-

tion as staked out was or was not void for uncertainty and excess. The Richmond-Rose case arose under the act of 1866 (14 Stats. 251), which provided that no location thereafter made should exceed 200 feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with a right to follow such vein to any depth, etc.; and provided further that no person should make more than one location on the same lode, and that not more than 3,000 feet should be taken in any one claim by any association or persons (sec. 4).

In that case there was, in fact, no excess at all, as the court finally held. The circumstances controlling that controversy were such as to distinguish it in almost all respects from those which are controlling in the case at bar. The location of the "Uncle Sam," which was assailed for excess by the St. George, was first in time and right. It appears that Rose, the locator, claimed the alleged excess, which was 200 feet of the vein, as his additional right as the discoverer, and that it was upon the denial of that right in him that excess was charged. The location, therefore, as made was lawfully made, and was capable of being carried into patent if the fact of the discovery could be maintained. This is a central and all-important factor in this discussion. The facts and the law are just the opposite in the matter of the location of the Emma. The utmost that can be claimed for that location is that it was made on the same day as was the Stemwinder. But the particular point of difference upon which we insist is that the Emma was at the first given boundaries in violation of the law; that no fact is suggested or alleged that could validate them, and that no patent of the United States could ever have included them. There is no room, therefore, for the operation of the excusatory circumstances which served in reaching the conclusion arrived at in Richmond Mining Company *v.* Rose.

Office Supreme Court U. S.
FILED.
NOV 23 1892
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1892.

THE STEMWINDER MINING CO.,
PLAINTIFF IN ERROR,
v.
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY ET AL.,
DEFENDANTS IN ERROR.

No. 62.

Supplemental Brief of Plaintiff in Error and Brief in reply.

ALBERT HAGAN,
S. S. BURDETT,
Attorneys for Plaintiff in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE STEMWINDER MINING COMPANY,
PLAINTIFF IN ERROR,

v.

THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY ET AL.,
DEFENDANTS IN ERROR.

No. 62.

Supplemental Brief of Plaintiff in Error and Brief in Reply.

In reply to the first question suggested but not argued in defendant's brief, that "it nowhere appears in the record of this case that the amount involved exceeds two thousand dollars, and the Court has no jurisdiction," &c., the plaintiff now comes and files this its supplemental brief and brief in reply, and shows to the Court that until such suggestion was made we were of the opinion that the showing as to the value of the premises in controversy

was in the record. It was made and filed under the provisions of section 1909 of the Revised Statutes of the United States, relating to appeals and writs of error from the respective Territorial supreme courts therein mentioned to this Court.

The same provision appears in the organic act of Idaho Territory.

Statutes at Large, vol. 12, p. 811, sec. 9.

By the act of March 3, 1885, the amount in controversy was raised to $5,000.

23 Statutes at Large, p. 443.

By the provisions of section 1909 of the Revised Statutes of the United States the value of the premises in controversy can be ascertained "by the oath of "either party or of other competent witnesses."

Revised Statutes, sec. 1909.

Judgment in the case at bar was rendered and entered in the trial court on the 5th day of October, 1888.

Rec. p. 189.

The decision and judgment of the supreme court of the then Territory of Idaho, in which the present writ of error was issued, was made and entered on the 18th day of March, 1889.

Record, pp. 234–5.

The writ of error herein was allowed on the first day of May, 1889, and served on the 29th day of May, 1889.

Record, pp. 242–3.

On the 25 day of March, 1889, before the allowance or issuance of said writ of error, the plaintiff in error caused to be filed with the clerk of the supreme court of

Idaho Territory the affidavits as to the value of premises or property in controversy, certified copies of which are on file with the clerk of this Court, copies of which are hereto annexed marked Exhibits A ~~and~~ B, and are made a part hereof.

Further replying to the brief of defendant in error (bottom of page 2), we deny that it is correct to say from the record that the excessive staking of the Emma was shown by the testimony or found by the court below to have happened "because of the rugged mountains and the nature of the ground it was impracticable at that time to be more accurate in the staking." The court below certainly did not say so at Record, 237, but did say that the Emma location "was not wholly void" but "was void only as to the excess." What or where the excess was is not suggested, or by what rule it may in such a case be ascertained is not pointed out. That it was *somewhat* void the court seems to concede, but how much so is not specified.

The testimony of Smith (Record, p. 146), one of the locators of the Emma, referred to in the middle paragraph on page 3, defendants' brief, does not sustain any contention that the Emma was first located. We insist that it sustains the opposite contention, and we here repeat what is a main contention on the part of the plaintiff, that the instructions finally given in fact and effect withdrew from the jury the question of priority of location.

The citations at page 5 are not in point. The case of Atkins *v.* Hendrie was a placer location made before 1872, and under local laws and regulations. Under the act of 1886, 200 feet, if excessive, could be cut off, and prior to 1872 any one could point out the excess under the act of 1866, but still we ask if a location under the act of 1872 is only void as to excess, *Where is the excess?*

It could be easily determined in cases like that of Richmond *v.* Rose, brought under the act of 1866, but how can the principles of that case apply to an excessive location under the act of 1872? Again, we insist that the Tarbet case (98 U. S. 463) does not refer to any matters of excess, and no such principle was involved, for in such a case the finding of excess would generally locate the surplus.

In the case at bar it is not a mere question of misleading somebody. It is a question of whether a grossly excessive location may stand as the lawful basis on which or out of which a lawful quantity may be surveyed for patent, and this without any amendment or readjustment of the lines of location. Such a contention is equivalent to holding that a survey for patent obviates the necessity of making a location at all, and may stand both as the location and as a patent survey.

The Land Department has from the first instructed its mineral surveyors to refuse to make a patent survey where a properly made and marked location is not found to be in existence. The regulations of November 20, 1873, reciting the provisions of the act of May 10, 1872, as to the requisites of location say:

"These provisions of the law must be strictly complied with in each case to entitle the claimant to a survey and patent, and therefore should a claimant under a location made subsequent to the passage of the mining act of May 10, 1872, who has not complied with said requirements in regard to marking the location upon the ground and recording the same, apply for a survey, you will decline to make it.

"The only relief for a party under such circumstances will be to make a new location in conformity to law and regulations, as no case will be approved and patented by this office unless these and all other provisions of law are substantially complied with."

Copp's U. S. Min. Lands, p. 69.
Philip Deppanger, 1 L. D. 581.

The Government is a party to this action and must be heard to complain.

Jackson *v.* Robie, 109 U. S. 440.

"In a suit brought under the Revised Statutes, section 2326, the title of each party is brought into question, and each party must make proof of his title before he can recover judgment in his favor."

Bay State M. Co. *v.* Brown, 21 Fed. Rep. 167.

"The effect of the act of March 3, 1881, as an amendment to that of May 10, 1872, is that neither party is entitled to a judgment in his favor unless he is *at the time* of the *adjudication entitled* to a patent for the premises in *controversy* by virtue of a *compliance* with the mining laws, &c.

"If neither party establishes such right * * * proceedings are stayed in the land office until a title is perfected."

McGinness *v.* Egbert, 5 Pac. Rep. 652.

Judge Sawyer in a recent case says:

It is claimed on one side and denied on the other that this suit having been brought to determine the title to a mining claim in pursuance to the requirements of section 2326 of the Revised Statutes as amended in March, 1881 (1 Suplt. Rev. Stat. 609), is for that reason a suit arising under the laws of the United States within the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the questions involved in the litigation.

It seems to us that all the authorities as they now stand have determined the question in favor of the affirmative of the proposition. This point was directly decided on the circuit by Mr. Justice Miller of the Supreme Court, in Frank *v.* Lorimer (8 Fed. Rep. 724).

Burke *v.* Bunker Hill Co., 46 Fed. Rep. 646.

Justice Brewer has also decided the same point in the same manner. He says:

"These questions are presented, and, whatever may be the true answers thereto, it is obvious from past judicial expressions that they cannot be considered as mere sham or pretended, but as real, substantial questions. Hence, as questions arising under the laws of the United States, they present a case cognizable by this Court," citing 8 Fed. Rep. 724; 115 U. S. 248.

Cheesman *v.* Shreeve, 37 Fed. Rep. 37.

Judge Knowles, in Strasburger *v.* Beecher (44 Fed. Rep. 213), in speaking of cases on adverse claims under section 2326 of the Revised Statutes, says: "To some extent the United States is a party to the action." (See Jackson *v.* Roby, 109 U. S. 440.) "This decision must be based "upon the theory, it appears to me, that the action pur- "suant to an adverse claim has for one of its objects the "determination as to whether either party has divested "the United States of the possessory title to the premises "in dispute."

This court sustained an appeal upon the ground that the action is under a Federal statute.

Chambers *v.* Harrington, 111 U. S. 351.

In Wolverton *v.* Nichols the same principle was decided by this Court.

119 U. S. 490.

In the case of Doe *v.* Waterloo M. Co. (43 Fed. Rep. 221), Judge Ross, in speaking of adverse claim suits such as the one at bar, says: "The sole object of the proceedings in court is the determination of the contest that arose in the Land Office, the point of which is, which of the applicants, if either, is entitled to receive the patent from

the Government? The right of possession referred to in the statute under consideration is not the right which flows from and is a part of the title or ownership of private land. * * * It has no relation to such a right, but it is the right that flows from a compliance with the laws prescribed by Congress for the acquisition of the Government patent for mineral lands," * * * and further says, on page 223 of the same case:

"The truth is, in each case the property belongs to the Government, which it is willing to convey to the party who has complied with the laws established for its disposition, and the question to be determined in cases of contest is, which of the parties, if either, has complied with those laws, and therefore acquired the right to the privilege given by the Government?"

Judge Sawyer, quoting the statute of March 3, 1881 (1 Supplt. Rev. Stat. 609), which reads as follows:

"That if in any action brought pursuant to section 2326 of the Revised Statutes title to the ground shall not be established by either party, the jury shall so find and judgment shall be entered according to the verdict. In such cases costs shall not be allowed to either party and the claimant shall not proceed in the Land Office or be entitled to a patent for the ground in *controversy until he shall have perfected his title*"—

then proceeds to say:

"But this amendment seems designed to change the whole proceedings and refer not only the question of the rights of the parties as between themselves, but also, without making the United States formally a party, to transfer the whole matter as between the United States and the successful party to the courts, thereby making the United States substantially though not formally a party to the suit, and on that ground it would seem that the United

States are entitled to have their rights determined in the national courts."

Burke *v.* Bunker Hill Co., 46 Fed. Rep. 647.

Therefore we say that as the Emma has never been located as the law requires, and as the owners have never at any time attempted to amend their location, the defendants in error are in no position to claim any patent from the Government by reason of their original location or any subsequent survey.

The survey in 1886 was simply a step in proceedings to obtain a patent, but could avail nothing unless based upon a valid existing location of the premises and a valid prior staking, working, and appropriation of the ground sought to be patented as the Emma.

It is laid across the vein and the side lines become the end lines. The end lines are not parallel. This is essential.

In Iron Silver M. Co. *v.* Elgin M. Co. (18 U. S. 20) Justice Field says:

"Under the act of 1866 parallelism of the end lines of a surface location was not required, but where a location has been made since the act of 1872 such parallelism is essential," &c.

The survey must be in accordance with the location. Therefore we say the attempt of the defendants to claim a *new location* by reason of a survey by a stranger long after the original locations of both mines is a mere quibble. The owners of the Stemwinder were therefore the first to take the initiative and amend their location so as to comply with the mining laws and conform its location to the strike of the vein as the laws require.

Defendants seek to break the force of our objection to

their location by saying it was no fraud—that we were not misled. The record itself refutes this proposition.

In the first place, staking out a claim large enough for three locations is itself nugatory, and claiming under such a location is *per se* a fraud and one entering within the limits of this exorbitant claim could not have notice of the area located, as there were no stakes properly defining the location so that its boundaries could be traced. Such a location operated to allow defendants to perpetrate a fraud upon others, and this the law will not tolerate.

A locator is presumed to know the extent and position of his own location, and if he fails to comply with the law he himself must be the sufferer, not persons who have no control of his actions.

Therefore a pretended official survey of the Emma without any new or amended location of the claim was without any right and never infused life into a location otherwise invalid. To establish a contrary doctrine would invite locators to monopolize a whole mining district by excessive locations and keep others out of possession until years after, when, if they chose, they could make a survey at any point within a vast domain so unlawfully held; then how could the court refuse to give the 12th instruction asked for by the plaintiffs?

We again contend that our instructions should have been given upon this point as claimed in our original brief.

Defendants seek to break the force of the court's refusal to give the 18th instruction asked for by plaintiffs. This instruction is taken from Strepy *v.* Stark (5 Pac. Rep. 111), referred to in our main brief; so also Craig *v.* Thompson, (16 Pac. Rep. 24–30); Mining Co. *v.* Mining Co. (6 Col. 380).

Instructions 13 and 14 do not cover the same ground

as that covered by instruction 18, referred to in the 7th assignment of errors.

Counsel, on page 8 of his brief, in attempting to escape the consequences of our 8th assignment of error, says "the "discovery *point* is not at the same place as was claimed in "the original location, but according to the testimony of "Mr. Carlin, on page 164 of the transcript, the locator of "the Stemwinder made his point of location 80 feet to the "north, so that the facts were sufficiently before the jury to "justify the court in giving the instruction."

By referring to the testimony of Carlin on page 164, and bill of exceptions bottom of page 48, it will be seen that the point of the *notice* of *location* is referred to *the post* or notice of Stemwinder, and not, as claimed by counsel, the *point* of *location* or *location point*.

A notice of location can be put anywhere. Our amended notice of location was posted at the south centre end stake (Record, p. 60). A discovery stake can be anywhere in the claim. The claim must be staked on the ground.

Thus the court erred in giving instruction 6 of defendants. This error has never been remedied. (See Record, p. 40.)

Instruction No. 6. This confines the jury to the discovery point and not to a change of position of the *notice* of *location*.

We submit that there were no facts before the jury upon which to base the instruction.

Counsel for defendant in error, in replying to our position that the court below erred in refusing to give instruction 22 as set out in our 27th assignment of errors, says "that the judge over his initials says that he did give the instruction," and refers to Record, pages 24 and 25, and then dismisses the question.

By reference to the Record (page 17) it will be seen that

counsel refers to certain requests that were filed or handed to the judge to give. These requests form no part of the Record and are not authenticated in any manner. They were slips of paper handed to the judge.

What the court or judge did do can be found in the bill of exceptions and statement on motion for a new trial, where in both instances the same judge certifies that he refused to give the instruction referred to. (See bill of exceptions, Record, p. 39, certified to by the judge, Record, p. 43. See also statement on motion for a new trial, Record, p. 183, certified to by the judge, page 212.)

At page 43 of Record the judge in his certificate says "that the within and foregoing bill of exceptions contains all the instructions given by the court to the jury."

This Court will not look beyond the Record as made up by bill of exceptions and statement on motion for a new trial; any other rule would lead to confusion and would not be tolerated. A mere memorandum of judge, or exhibit not certified to by judge as a part of the Record, can not be considered.

Reed *v.* Gardner, 17 Wall. 409.

In the above case the court says: "In passing upon the questions presented in a bill of exceptions this court will not look beyond the bill itself." (See also Noble *v.* Jackson, 9 Wall. 125.)

We submit that the court did refuse to give the instruction asked for and committed error.

Storm *v.* U. S., 94 U. S. 76.

England *v.* Gebhardt, 112 U. S. 502.

Again, counsel for defendant in error admits that the Emma discovery point is within the limits of the Stemwinder claim (Brief, p. 13). This, taken in connection with the fact that the Emma notice of location refers to

the Stemwinder as having been located already, makes the Emma location void.

Belk *v.* Meagher, 104 U. S. 284.
Guillam *v.* Donallen, 115 U. S. 45.

Again, in replying to our 23d assignment of error, counsel avoids the real question. By reference to that assignment it will be seen that the court confined the plaintiff in error to 300 feet on the northerly side, which was along the course of the vein and not on the side thereof.

In reply to the 10th assignment of error the defendant refers to the fact that the only fixed object that the Emma notice refers to is the Stemwinder, and refers to Havener *v.* The Garfield M. Co. (130 U. S. 299).

Unfortunately for the defendant in error, that case holds that the reference to another mining claim is good. In case at bar, if the Emma notice is good it is by reason of the fact that the only fixed object it refers to is the Stemwinder. Therefore we say defendant in error admits a junior location. Being on Jackass prairie is not good.

Drummond *v.* Long, 13 Pac. Rep. 544.
Faxon *v.* Barnard, 4 Fed. Rep. 702.

We again submit that the judgment should be reversed.

Respectfully submitted.

ALBERT HAGAN,
S. S. BURDETT,
Attorneys for Plaintiff in Error.

 E & A

IN THE SUPREME COURT OF IDAHO TERRITORY.

THE STEMWINDER MINING COMPANY, Appellant,
v.
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY, JOHN M. BURKE, *et al.*, Respondents.

TERRITORY OF IDAHO, }
County of Shoshone, } *ss:*

Van. B. De Lashmutt, being first duly sworn, on his oath deposes and says:

That he is the president of the Stemwinder Mining Company, the plaintiff in the court below and appellant in the supreme court of the Territory of Idaho. That he makes this affidavit for and on behalf of said company.

That the said company is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in Oregon, in the city of Portland.

That the said company owns the Stemwinder mining claim, a portion of which is in controversy in this action, to wit, the area in conflict as mentioned and described in the complaint and answer herein. That said mining claim is situated in Yreka Mining District, county of Shoshone, Territory of Idaho, and that said company is doing business therein, with its principal place of business at Wardner, in said county and Territory.

That the title to a portion of said Stemwinder mining claim is in controversy in this action, and if the judgment rendered in the lower court is not reversed and the errors therein corrected, the Stemwinder Mining Company will be deprived of all that portion of said mining claim hereinbefore mentioned as the area or ground in conflict. That the Stemwinder mining claim itself is of great value, to wit, of not less the value of three hundred thousand dollars ($300,000), and that the area in conflict herein being a portion of said Stemwinder Mining Claim, a por-

tion of which is being litigated herein with the defendants and respondents, is of the value of more than five thousand dollars ($5,000), to wit, not less than ten thousand dollars ($10,000).

VAN. B. DE LASHMUTT.

Subscribed and sworn to before me this 14th day of March, 1889.

[SEAL.] H. M. DAVENPORT,
Notary Public.

Filed March 25, 1889, S. H. Hays, clerk.

Ex B

IN THE SUPREME COURT OF IDAHO TERRITORY.

THE STEMWINDER MINING COMPANY, Plaintiff and Appellant,
v.
THE EMMA AND LAST CHANCE CONSOLIDATED MINING COMPANY, JOHN M. BURKE, *et al.*, Defendants and Respondents.

TERRITORY OF IDAHO, } ss :
County of Shoshone, }

George B. McAulay, being first duly sworn, upon his oath deposes and says :

That he is the agent of the Stemwinder Mining Company, the appellant in the supreme court of the Territory of Idaho, and the plaintiff in the above-entitled action in the court below.

That he is such agent designated by such company upon whom process can be served, and resides in the county of Shoshone, and Territory of Idaho, and makes this affidavit for and on behalf of said company.

That said Stemwinder Mining Company is the owner of what is known and mentioned in the records in said action as the Stemwinder Mining Claim referred to in the complaint and answer herein, which said mining claim is

situated in Yreka Mining District, county of Shoshone, Territory of Idaho.

That affiant is conversant with the value of the workings and developments of said mining claim, has been in charge thereof for some time and is now manager thereof and knows the value of said mining claim.

That the area in conflict herein is within the limits of said Stemwinder mining claim that is mentioned and set out in the complaint herein, and is the ground in controversy in this action, that such ground in controversy and the area in conflict as set out in the complaint herein is of the value of more than five thousand dollars (5,000), to wit, of not less than ten thousand (10,000) dollars.

GEO. B. McAULAY.

Subscribed and sworn to before me this 14th day of March, 1889.

[SEAL.] H. M. DAVENPORT,
Notary Public.

TERRITORY OF IDAHO, }
County of Shoshone, } *ss:*

James Cronin and John King, being first duly sworn, depose and say, each for himself and not one for the other, that he is a citizen of the United States over the age of twenty-one years, and is a resident of the county of Shoshone and Territory of Idaho, and has read the affidavit of George B. McAulay, and in this action hereby make said affidavit a portion of his own.

And furthermore says: That he is a disinterested party herein and has no interest in the event of this suit; that he is well acquainted with the Stemwinder and Emma mining claims and well acquainted with the values of each and acquainted with the area in conflict herein, and knows the ground mentioned in the pleadings herein as the conflict area between the Emma and Stemwinder mining claims. That the conflict involved in said areas and in this action is the same, and the same is worth more than the sum of five thousand dollars ($5,000), to

wit, of the value of not less than ten thousand ($10,000) dollars.

JAMES CRONIN,
JOHN KING.

Subscribed and sworn to before me this the 14th day of March, 1889.

[SEAL.] H. M. DAVENPORT,
Notary Public.

TERRITORY OF IDAHO, } ss:
County of Ada, }

Albert Hagan, being first duly sworn, deposes and says he served the foregoing and written affidavits of Van. B. De Lashmut, George B. McAulay, John King, and James Cronin upon Messrs. Woods & Heyburn, attorneys for the Emma and Last Chance Consolidated Mining Company, on the 23rd day of March, 1889, by delivering and causing to be delivered to them a true copy and copies of the same at Shoshone county, Idaho Territory, on said day.

ALBERT HAGAN.

Subscribed and sworn to before me this 25th day of March, 1889.

S. H. HAYS,
Clerk, Supreme Court, Idaho Territory.

Filed March 25th, 1889, S. H. Hays, clerk.

STATE OF IDAHO, } ss:
County of Ada, }

I, Sol Hasbrouck, clerk of the supreme court of the State of Idaho, do hereby certify that the above and foregoing are true copies of the originals now on file in my office, and that the date of filing on the said affidavits is March 25th, 1889.

Witness my signature and the seal of said court.

Done at Boise City, Idaho, this 16th day of November, 1892.

[SEAL.] SOL HASBROUCK,
Clerk.

Mining Company *v.* Tarbet (98 U. S. 463), cited by the court below, does not sustain the position that the location of the Emma was void only as to the excess. That was not the controversy in that case, nor was the question raised or decided.

The act of May 10, 1872, worked a radical change in the manner of locating claims. The supreme court of Nevada in Gleason *v.* The Martin White M. Co. (13 Nev. 442) takes occasion to notice the change under the mining act referred to. The court says:

"That the Government in disposing of its mineral lands has adopted a radically different system under which a vein can only be located by means of a surface claim and held only to the extent that it is included within the surface lines is a thing too incredible to be believed by those to whom the old customs seemed rooted in the very foundations of justice, but, disagreeable as the awakening may be, it is time we were opening our eyes to the fact that a new system has been introduced."

The act of May 10, 1872, has effected the changes above indicated. Its language is plain and unambiguous. Locators are bound to submit and conform to its requirements. In the Richmond-Rose case this Court was passing upon a question under the system of the act of 1866, which act and system had been repealed by the act of 1872 at the time of the trial of the case at bar. The latter act provides specifically that the locator of a mining claim shall make and define his boundaries by reference to natural objects and permanent monuments, and that he shall mark the location upon the ground so that its boundaries can be readily traced. These provisions are mandatory. They were passed in view of the fact that a party taking mineral lands out of the general body of such lands was privileged to make his own selection, and therefore ought

to and must so select and mark the tract he elects to take that the segregation he thus makes for himself shall be just and lawful towards the United States and towards other locators equally privileged with himself.

This principle is involved in the case of

Jupiter M. Co. *v.* Bodie M. Co., 11 Fed. Rep. 666.

We seek in the case at bar a construction of the act of 1872 and not the act of 1866. Under the latter act the *vein* was located. The location was not required to be staked. The locators claimed from their notice and followed the ledge wherever found and wherever it ran irrespective of the calls of the notice. The ground allowed upon each side of the vein was for working purposes only. Under the act of 1872 the Government purposes to sell its mineral lands in a different manner. Each locator is made a mining pre-emptor under the rule as laid down in Cowell *v.* Lamars (21 Fed. Rep. 200). The act requires the discovery of a vein, a location of the tract, and annual assessment work. This being done, the locator holds the title to the ground staked out, if within the law, as securely as he would under a patent. It becomes a vested estate.

Belk *v.* Meagher, 104 U. S. 279.

Under the act of 1872 the Government sells so many acres of land, not to exceed twenty, provided there is a ledge or vein in it, to wit: a parallelogram 1,500 feet by 600. The discovery being made of a ledge or lode, the locator proceeds to stake his claim at his peril. Two sets of lines are named in the statute—end lines and side lines. The claim is allowed to equal but not to exceed 1,500 feet along the lode, hence every locator endeavors to locate along the vein and the law implicitly requires it. The side lines are those which measure the extent of the claim

on each side of the middle of the vein at the surface; the end lines are those which are crosswise of the general course of the vein.

Argentine *v.* Terrible, 122 U. S. 478.
Iron Silver Co. *v.* Elgin Co., 118 U. S. 196.
Mining Co. *v.* Tarbot, 98 U. S. 463.

The Emma as located presents a four-sided figure, whose greatest length is 2,340 feet, with a base or width of 900 feet. It lies *across* and not along the course of the vein. Such a location is in no sense and in no particular a compliance with the law authorizing and governing mining locations (R. S. sec. 2320). Within such area several distinct claims as large as the Emma, as surveyed for patent, could be located. It left room for choice, shifting or other change, to almost any extent that might suit the interest or desire of the locator. As so marked and maintained it was not, and could not be, notice of a location or of the boundaries of a location such as the law demands.

A search for the boundaries, beginning from the point where the discovery stake and notice are alleged to have been placed, and following the calls of the notice, would not have resulted in the finding of any marks upon the ground, distinct or otherwise, nor have given point or indication by which the boundaries could have been traced. If a general exploration of the vicinity had diclosed the existence of the stakes alleged to have been placed at the easterly and westerly end of the Emma claim their position as to each other would have contradicted any presumption that they evidenced a location under sec. 2320 of the Revised Statutes.

There is no showing or intimation that this was by mistake or misadventure. As before remarked, this location

was never amended or disavowed. It remained the location on which title to the Emma claim was and is predicated and as the segregation which protected its contents from appropriation by others. It was made and maintained in palpable violation of law, and must be held to be void.

We are not without authority as to the construction to be placed upon the provisions of law requiring the marking and defining of a claim upon the ground. In Hauswirth *v.* Butcher (1 Pacific Rep. 714) the court passes directly upon the act of Congress of May, 1872. In that case the mining claim was located 2,000 feet in length. The court says:

"A location upon the public mineral lands of the United States carries with it a grant from the Government to the person making the same. * * * In order to make this grant effectual the location must be distinctly marked upon the ground so that its boundaries can be readily traced, and the record of the location must contain such a description of the claim as will identify it by reference to natural object or permanent monument."

The court further says:

"Neither a grant nor the right of possession attaches to a location that does not give the notice required."

Again the court says:

"Taking the discovery as the initial point, the boundaries must be so definite and certain that they can be readily traced, and they must be within the limits authorized by law; otherwise their purpose and object would be defeated. The area bounded by the location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Bounflaries beyond the maximum extent of the

location would not impart notice and would be equivalent to no boundaries at all."

In Gleason *v.* Martin White M. Co. (13 Nev. 462) the court says:

"The object of the act of May 10, 1872, is to fix the claim to prevent floating and swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of precious locations may be able to ascertain exactly what has been appropriated in order to make their locations upon the residue. The provisions of the law designed for the attainment of this object are most important and beneficent and ought not to be frittered away by construction."

Again, in Mt. Diablo Co. *v.* Gallison (5 Sawyer, 449) the learned judge says:

"The locator should make his location so certain that miners who follow him may know the extent of his claim and be able to locate the unoccupied ground without fear that when they have found a paying mine that the theretofore indefinite lines of some prior location may be made to embrace it."

In that case the court holds the location void for the reason that it gave ground for fraud, ground for dispute; that it failed to comply with the law and left open the door for fraudulent construction.

No honest inquirer could go to the Emma as staked originally and imagine for a moment that the Emma claim would be surveyed and claimed where it now appears upon the map in evidence. The stakes set by the locator imparted no notice to any prospector of the extent of the ground located, and enabled the locators to swing and shift the location west 500 feet or east nearly 800 feet to include any valuable discovery made either east or west.

It is really a location 2,300 feet long by 900 feet wide, with the privilege of selecting 1,500 feet somewhere within the exterior limits. If it is only void as to the excess the question would arise, where is the excess and at what point would a locator choose to cut off the excessive part so as to prevent doing injustice to others?

In the case of Leggatt *v.* Stewart (2 Pac. Rep. 320, 5 Mont. 108) the court instructed the jury that a location even smaller than the one at bar, which was only 260 feet in excess of that allowed by law, was void for uncertainty, and this, too, under the act of 1872. The court says in that case that the area bounded by a location must be within the limits of the grant and no one would be required to look outside of such limits for the boundaries of the location. Boundaries beyond the maximum extent of the location would not impart notice and would be equivalent to no notice at all.

In the case at bar there is no pretence whatever that the premises on which a patent is applied for as the Emma mine were ever marked or defined or located, nor does the notice of location put in evidence call for such premises. The question of mistake or of intent cannot enter into this case. The excess is too great to be accounted for by mere misadventure. Still here is a location that is confessedly almost the size of two lawful locations in length. The locators are allowed to survey a tract inside of it without ever amending their location or making a valid location and marking the same upon the ground. We submit that the court should have given the instructions specified in the errors above, or at least the instruction asked for as No. 22 and set out and specified as the 27th specification of error. Had such instruction been given it would have left to the jury the question as to whether the location was marked

so that its boundaries could be readily traced. We claim that to refuse this instruction as well as the others was practically to disregard the law of the United States, as well as the positive, plain provisions of the Territorial Statutes.

The supreme court of Idaho was in error in stating in its opinion that the trial court charged the "22d proposition" except as to two or three lines which should not have been charged. The bill of exceptions (Record, p. 39) and the motion for a new trial (Record, p. 183) both show that such instruction was refused.

We submit in this connection that the instruction given at the request of the defendant (Rec. 39) and referred to in the 23d assignment of errors in this Court was misleading and not the law. There was nothing in the case or record to justify such instruction, as it is given without reference to the fact that the trend of the vein is nearly north and south and the owners of the Stemwinder were entitled to it all within the lines of their original location. The sufficiency of the description must be left to the jury. This was decided by Judge Sawyer in North Noonday Co. *v.* Orient M. Co. (6 Sawyer, 299). It was said in the same case that if "location is 600 feet in width, although *across* the vein, the locator can and will take all veins whose apices are within the limits so located."

Therefore the last-named instruction was erroneous and, taken with the others, certainly took from the jury their right to decide upon such questions. For the same reasons the court erred in refusing to give the 23d instruction asked for by the plaintiff, which is marked "Refused" (Rec. 25, 187), because it would have left to the jury the question as to whether or not the Emma location had been properly marked, staked, and defined upon the ground, and whether or not the location of the mine was sufficient

to give a person attempting to trace the boundaries of the claim upon the ground notice; if not, it was certainly void. See cases above on the same subject, and also—

Hauswirth *v.* Butcher, 4 Mont. 299.
Leggatt *v.* Stewart, 2 Pac. Rep. 320.
Craig *v.* Johnson, 16 Pac. Rep. 24.
Anderson *v.* Black, 70 Cal. 226.
Taylor *v.* Middleton, 67 Cal. 656.
See also Gonu *v.* Russell, 3 Mont. 358; same case, 12 Mor. Rep. 630.
Holland *v.* Mt. Auburn Co. 9 Mor. Rep. 497.
Gelsich *v.* Moriarity, 9 Mor. Rep. 498.
Newhill *v.* Thurston, 65 Cal. 419.
Eillers *v.* Boatman, 111 U. S. 356.
North Noonday Case, 6 Sawyer, 299, *supra.*

So, also, as set out in specification 12, when the jury returned into court and held a colloquy with the court (Rec. pp. 42–43), the court then limited the effect of all of its instructions, and even took from the jury the right to determine where the vein ran and where to locate the centre of the vein. This was error. The court held that the measurement of 300 feet must be from *the discovery point.* This was error. See cases cited above.

II.

We next invite attention to the specifications of error numbered 6, 7, 8, 9, 26, 28 and 29, and will consider them all under one head. They involve the question of the right of the Stemwinder Mining Company to make an amended location after its purchase of the mine and the effect thereof. By a positive instruction of the court the jury were told that the Stemwinder Mining Company is a cor-

poration organized under the laws of the State of Oregon and no such corporation is entitled to the privilege of making a mineral location of lands belonging to the U. S. (Rec. 40, Inst. No. 7). This instruction becomes all-important in its effect upon the jury when we consider what took place between the court and the jury upon the jury's return into court. We specially direct the attention of this Court to that part of the Record (page 41) commencing at the words "at three o'clock p. m. of September 29th, the jury came into court and asked for further instructions," thence down to and including the certificate of the bill of exceptions (page 43).

It will be seen that the court confines the jury entirely to the question of the original location and ignores the amended location of the Stemwinder Mining Company, which had already been put in evidence. By reference to the pleadings in the case it will be seen that the plaintiff in error commenced its suit for the premises mentioned in the amended location and has all through maintained its right to that ground, claiming that by reason of its amended location it really was the only valid locator of the ground in dispute. This the court summarily disposes of by saying that the Stemwinder Mining Company cannot make a location at all by reason of being an Oregon corporation, and upon the return of the jury into court for further instruction the court, after stating that they were to limit the application of the verbal instructions given to the ground in dispute between the two mines (Rec. p. 42), and still referring to the *original* location, tells them that "the Stemwinder may have been the prior valid location, but if it did not lawfully include the ground in dispute, then the instruction as to priority would not apply."

The court had already told the jury in effect, in the

6th of defendants' instructions (Rec. 40), that if the amended location was at right angles to the course of the location as originally made that that would be such a material change of the location as to amount to a relocation. That instruction, coupled with the further one that the Stemwinder Mining Company, the owner of the ground, could not make an amended location, nor any location at all, is tantamount to telling the jury that the ground we claimed under the amended location was not ours. The amended location of the Stemwinder having been made before the Emma had ever been properly staked or amended, the plaintiff's was the only valid location on the vein; therefore to instruct the jury that the Stemwinder Mining Company could not make a location at all was to instruct them to ignore the amended location entirely, although the ground and premises sued for herein are described as bounded by such amended location. Our title, if any we had, could not have been divested by any other pretended location. Our rights became fixed by the two locations.

Belk *v.* Meagher, 1 Mor. 510; 104 U. S. 279.
Lincoln *v.* Sierra Company, 25 Fed. 337.
Russell *v.* Brosseau, 65 Cal. 605.
North Noonday Case, 6 Sawyer, 299.

The amended location of the Stemwinder Mining Claim referred to herein is found in the Record, at page 112, and the original notice of the Stemwinder, Rec. 110, and they speak for themselves.

That it might appear that the plaintiff corporation was qualified to make a location the plaintiff offered to show in the trial court that all the stockholders of the Stemwinder mining claim were citizens of the United States, and to that end Mr. DeLashmutt, president of the com-

pany, was put upon the stand and was asked how many shares of the capital stock of the Stemwinder Mining Company, the plaintiff, he owned. This was after testifying that he was a citizen of the United States (Rec. 46). The court against the plaintiff's objection, ruled that the question was immaterial (Rec. 46). He was then asked if the stockholders of the company were citizens of the United States. His answer was "Yes," and on motion of the defendants' counsel the answer was objected to and stricken out as immaterial (Rec. 46-47).

This was competent evidence. Without it the plaintiff could allege no right as flowing to it by reason of the amended location of the ground described in the complaint. The exclusion of this evidence, and the instruction that the plaintiff company was, because of its being a corporation, forbidden to locate mineral lands, in effect took the plaintiff's case from the jury.

Under the act approved March 3, 1887 (sec. 2, 24 Stats. p. 477), corporations may acquire public lands of the United States subject to the condition that not more than twenty per cent. of the stock shall be owned by persons not citizens of the United States. The trial court refused to permit plaintiff to show that it was not within this exception. The right of a corporation created under the laws of a State, all of whose members are citizens of the United States, to locate a mining claim on the public lands was set at rest by this court in—

McKinley *v.* Wheeler, 130 U. S. 630.

See, also—

Thomas *v.* Chisholm, 21 Pac. Rep. 1019.

The supreme court of Idaho Territory misapprehended not only the case of the plaintiff in error as set out in the pleadings and shown by the evidence, but also the

force of the instruction relative to the corporate rights of the plaintiff company and the bearing that instruction had upon the issues tried below. The court said upon this point:

"Without deciding whether this was error or not, we can safely say it is not such an error, in this case, as would justify the court in reversing the judgment. There was no evidence that the corporation made the location; on the contrary, the evidence was conclusive that the corporation did not make the location, and the charge, even though error, could not in any way have injured the plaintiff."

This remark of the supreme court of Idaho emphasizes our contention that that court misapprehended the relation which the instruction under review bore to the plaintiff company. That company had found it necessary to reform the original location as made by its vendors, and in view of that fact the trial court, at the defendants' request, gave the 6th instruction (Record, 27), which imported into the case the question of *relocation*, the effect thereof, and the persons and the class of persons entitled to *relocate* portions of the public lands under the mining laws. There were no such facts in the defendant company's case. An instruction for the plaintiff couched in the very terms of that given for defendant (No. 7, Record, 27) would have had nothing to operate upon. No relocation or amendment of a location was ever attempted by the defendant company or by its grantors. The original blanket location continued to be at all times its reliance for source of or the initiation of its claim and location.

The misleading influence on the minds of the jury of these instructions (defts., No. 6 and 7, Rec. 27) becomes further apparent when the conversations between the court and jury and the further instructions resulting therefrom are considered.

The court had said, in addressing the jury orally, "that there is really but one question in this case. The whole case is practically limited to that question—that is, Who first made a valid location on this ground? That is really the whole question, stripped of the evidence and stripped of all the facts in the case; that is the point" (Rec. 41).

The jury retired, but returned for further instructions.

The colloquy that then ensued between the court and the jury showed unmistakably that in the light of the said seventh instruction and the said verbal instruction the jury was in doubt as to what their verdict should be. Juror Weber's questions and answer to the court show this (Record 42).

The further instruction thereupon, given at defendants' request, was that "the Stemwinder may have been the prior valid location; but if it did not lawfully include ground in dispute, then the instruction as to priority would not apply." This emphasized the point made by the court that all depended on the *original* locations, and gave the jury to understand that the plaintiff's amended location, not having been made by a party lawfully authorized to make it, was not to be considered by them even though it did include the ground in dispute.

The amended location was the very basis of the plaintiff's action. The complaint alleges it specifically (Record, p. 2). The answer denies it. The amended notice of location was put in evidence (Record, p. 112).

The plaintiff, as will be seen by reference to the 18th instruction offered on its behalf (Rec. p. 38), took proper steps to have the law as to what constitutes a valid location given to the jury. The instruction offered (No. 18) was framed on the ruling of the court in Strepy *v.* Stark (5 Pac. Rep. 111). The court refused to give it.

The plaintiff insisted upon the contention that the amended location of the Stemwinder having been made before the Emma had been properly staked and bounded, it had the only valid location on the vein. If this contention is correct, then the following authorities apply:

Belk *v.* Meagher, 1 Mon. 510.
Belcher *v.* Defearen, 62 Cal. 160.
Lakin *v.* Sierra Butte Co., 25 Fed. Rep. 337.
Russel *v.* Brosseau, 65 Cal. 605.

Again, the instruction given at defendants' request (Record, 42), that "the Stemwinder may have been the prior valid location; but if it did not lawfully include ground in dispute, then the instruction as to priority would not apply," taken in connection with what the court had previously told the jury, viz., that if they found that the Stemwinder was the prior location, that ended it—that they need go no further—was wrong and misleading in that it largely, if not wholly, took from the jury inquiry and consideration as to the validity of the plaintiff's original location. It made that a mere moot question in the case if, by its original location, it "did not lawfully include the ground in dispute." It further took from the jury all occasion for considering the question as to whether or not the plaintiff company could or did take anything by its amended location. It made the fact that the amended location was the only one ever made along the course of the vein, and the fact that the defendant company never did make a location along the vein, of no significance. There are cases where a junior location which properly identifies and includes the vein may prevail against a senior location made upon a vein or lode not properly marked or devoloped, and whose true direction is at some

subsequent time found to bring it within the lines of the junior claim.

O'Reilley *v.* Campbell, 116 U. S. 418.

The peculiar state of the facts with relation to the original locations both in respect to priority and to conflict makes the position thus taken by the trial court important.

The locations were made about the same time. There was testimony tending to show that they were initiated on the same day. The map at page 66 of the Record had been put in evidence. Points had been marked upon it to show where the stakes of both of the original locations had been placed and exhibiting a conflict between them involving an area much larger than the tract embraced by the controversy at bar, making the question of amendment an important and vital one for the consideration of the jury. Under the pleadings and proofs and under some of the instructions a question arose as to whether or not the area in conflict was to the north of the northerly line of the original Stemwinder location, and therefore not embraced in it. This raised the question, if that were found to be the fact, whether the amended location, notwithstanding the claim of defendant that that portion was a part of its ground, was not the first valid location of that area, and would have called for a finding by the jury on the question of the validity of defendant's alleged location. But the said seventh instruction took that question from the jury by declaring the plaintiff incompetent to make a location at all, and it practically eliminated out of the case all question as to the validity of the Emma location; for, the rule being laid down that the plaintiff could under no circumstances go beyond or outside of the lines which Devine had marked, there was

nothing left in the case which called on the jury to pass on the question of the validity of the Emma location at all or for any purpose.

We contend that the court by its various instructions intended to take and did take the question of the validity as well as the fact of the amended location of the plaintiff in error from the jury and eliminated it from the case, and finally made that intention the more certain by telling the jury that the plaintiff in error could not make a location at all. The authorities uniformly hold that a notice of location of itself is only a proof of the performance of one step in perfecting the location, and when the location notice for any reason is deemed void it has been held admissible in connection with the amended location correcting the defects of the original.

See—

Van Zandt *v.* Argentine, 8 Fed. Rep. 725.
Strepy *v.* Spark, 5 Pac. Rep. 111.
McGinnis *v.* Egbert, 5 Pac. Rep. 652.

The amended notice relates back to the original and corrects defects therein. Cases cited above; also—

North Noonday Mining Co. *v.* Orient Mining Co., 6 Sawyer, 299.
McEvoy *v.* Hyman, 25 Fed. Rep. 596.

This being so, and it appearing, as will be seen by reference to the map, that the discovery point of the Emma is within the limits of the Stemwinder as located, the Emma location is, therefore, void.

Belk *v.* Meagher, 104 U. S. 279.

The jury were told that a locator could only claim 300 feet on each side of the middle of his vein or lode. This was correct so far as side lines are concerned, but the

court further said in instruction No. 2 of defendant (Rec. p. 39, specification No. 23) that if Devine included more than 300 feet on the *northerly side of the point of discovery* his location was void as to the excess. This instruction is radically erroneous, for it not only confined the plaintiff's case to the original location made by Devine, thus ignoring the fact of amended location by the plaintiff along the vein, but was tantamount to telling the jury that the vein runs east and west.

We submit that the instruction set out in specification 13 (Rec. p. 43) should have been given. It is as follows, to wit:

"That if they found that the locator of the Stemwinder located on a vein and it includes less than 1,500 feet on the vein, and that the vein was found to cross the location, then if the location is found to be so made, the locator can take the vein to the limits of his side lines as so located, wherever it runs. 300 feet on each side of the vein means a measurement from the centre of the vein at any point within the location so made until it passes out of the exterior boundaries of the location."

This has become the settled mining law of the land and would have relieved the jury when they so pointedly asked the court how far the Stemwinder could go to the north or on each side of the discovery. A locator is entitled to his vein the apex of which is within his location, and it matters not whether it goes out at the side or the end lines.

III.

Compromise line—specifications numbers 14, 15, 17, 18, 19, and 20.

By reference to the Record, 120, it will be seen that De-

vine, the locator, sold the claim to DeLashmutt, and he to the plaintiff in error. Trask, a witness for the defendant, who, as a deputy mineral surveyor, made the survey for patent of the Emma mine, was permitted by the court, against the plaintiff's objection, to testify that he was told to select a particular place as the southwest corner of the survey (Rec. 47).

Carlin, another witness, testified, against the objections of the plaintiff in error, to a pretended compromise mark or monument (Rec. 48), and the map offered in evidence by defendant in error has this point marked upon it (Rec. 132).

We contend that as a matter of law an agreement fixing the boundary or boundary lines between the Emma and Stemwinder was void under the statute of frauds, also upon the ground that it never was acted upon, nor is such a question raised by the pleadings. Further, there is no testimony that the claimants of the Emma ever erected improvements or made developments upon the strength of any boundary line, nor was the Emma location ever amended so as to conform to any fixed boundaries. No verbal agreement between Devine and the owners or reputed owners of the Emma at the time could bind the plaintiff in error, and such agreement is void; Devine himself is estopped from asserting it. We also insist that, the Emma location being void in its incipiency, and having been made within the exterior limits of the Stemwinder, there was nothing to fix the boundary upon. If the theory of the defendants is correct the allowing the Emma location to overlap the Stemwinder was virtually an abandonment of the Stemwinder grounds as originally located.

The grant given under the mining act cannot be created by parol. There must be a valid location and strict compliance with the statute. The grant then becomes com-

plete, and no parol evidence is admissible to vary its terms. In the case at bar it is not competent to create or give vitality to the Emma location where none existed before.

In Garthe *v.* Hart (15 Pac. Rep. 93) the supreme court of California held that no parol agreement as to boundaries of a mining claim was valid. The court, after referring to section 1091 of the civil code of California, which is identical with section 6007 of the Idaho code, and saying that there was evidence tending to show an adjustment of boundaries between the parties by oral agreement, holds that, first, no estate or interest in real property or in any manner relating thereto or concerning it can be created, granted, assigned, or surrendered unless by an operation of law or a conveyance or other instrument in writing subscribed by the party," and that, second, "an oral agreement could not operate as a transfer."

See also Melton *v.* Lambard, 51 Cal. 259–260.
Section 6007, Rev. Stat. Idaho.
Section 2920, Rev. Stat. Idaho.
Jackson *v.* Sherman, 6 Johnson, 19.
Jackson *v.* Vosberg, 7 Johnson, 186.

Each party in a contest over a mining claim must recover upon the strength of his own title. Under the act of Congress of 1881, the jury can find for or against either plaintiff or defendant.

Jackson *v.* Robie, 109 U. S. 440.

In a suit brought under section 2326 of the Revised Statutes of the United States to determine the right of possession of an adverse claim, the title to each party to the disputed premises is brought into question, and each

party must make proof of his title thereto before he can recover a judgment in his favor.

Bay State Company *v.* Brown, 21 Fed. Rep. 167.

The defendants in error should have been compelled to prove their legal title to the premises by a compliance with the mining laws, and no verbal compromise so vague as the one attempted can invest them with title, if they never acquired one under the *law*.

The Stemwinder was prior in time. It was admitted by Smith, one of the locators of the Emma, at the trial that their claim was not staked until the 18th or 19th of September, 1885, and that he first saw the notice was posted on the claim on September 20, 1885 (Rec. 151 and 154). Smith, the locator of the Emma, left 600 or 700 feet for the Stemwinder (Rec. 154, 160).

The notice of location of the Emma describes it as situated "on Iron Creek, about two and one-half miles in southerly direction from Jackass Prairie and being northerly and adjoining the Stemwinder." In view of the facts as admitted by Smith, one of the Emma locators, and the recital in the Emma notice, how could there be any question as to which was the prior location? If the Emma is north of and adjoining the Stemwinder, then there was already such a claim in existence.

In the case of Hicks *v.* Whiteside (35 Cal. 154), the court says:

"The plaintiff's claim is bounded on the north by the Whiteside's claim and we are at a loss to comprehend on what theory it can possiby be made to include Whitesides claim or any part of it.

"It needs no argument to show that when one claim is bounded by another there can be no conflict of boundaries between them and *the only fact to* be ascertained is the true location of the boundaries of the first claim."

Greer *v.* Mezes, 24 How. 268.

The court in its instructions as shown in Record, pp. 184 and 39, told the jury that if they found that Devine included more than 300 feet within his stakes on the northerly side of the point of discovery at the time the notice was posted and his boundaries marked, his location was void as to excess, and that if such excess was originally included within the boundaries of the Emma location it belonged to the Emma.

Thus the jury are virtually told that the original Stemwinder location could not extend over 300 feet on or along the vein, or to the north. The court thus took away from the jury the question as to the priority of location. This is evidently what was in the mind of the jury upon their return into court (Rec. pp. 41 and 42).

Can the parties now be heard to say that the Stemwinder had not been located?

Estoppel applies to mining claims.

Kelly *v.* Taylor, 23 Cal. 11.

Patterson *v.* Hitchcock, 3 Col. 533.

In order to excuse the act of locating the discovery point of the Emma within the limits of the Stemwinder, the defendants secured from the court instructions Nos. 2 and 3 (Rec. 184). They mean nothing less than that any locator has the right to approach within 300 feet of his neighbor at any point from the point of the latter's discovery, and locate another claim within the so-called excessive boundaries. No. 2 of defendants' instructions is therefore erroneous. No. 3 given on the part of the defendants is equally erroneous, because it implies and excuses a trespass, and advised the jury that if they found that the discovery of the Emma mining claim was within such excess, to wit, 300 feet from the point of discovery of the Stemwinder, they would find that it was not made within the boundaries of the Stemwinder claim.

Although the answer asserts that the Emma was a prior location, and the issue for trial was the question of priority of title, the defendants claim that if it is found that they were not prior in time, still that the Stemwinder was excessive, and they had a right to make a location within its boundaries; also that if the Emma was located 300 feet distant in any direction from the point of the Stemwinder *discovery*, it was located outside of the Stemwinder ground. We submit that the two instructions are erroneous upon their face, and entitle us to a reversal of the judgment.

IV.

We next invite the attention of the Court to specifications of error numbered 10, 11, 12, and 13.

Numbers 10 and 11 are both contradictory and confusing.

The court erred in giving the instruction (Rec. p. 42, specification 10), in response to the question by the juror, Sage, that at the time of the location of a mining claim the location must be from the point of discovery, the middle of the point of discovery. Now, these two mines were located upon the same day, or within twenty-four hours of each other; therefore there could not be much work other than the point of discovery, and the court tells the jury that the only knowledge they can have of the vein is that part which crops out at the point of discovery, and that the locator is not entitled to over three hundred feet on each side of the middle of the vein at the point of discovery. Then the court tells the jury that the real point in issue is, who made the first valid location, and whoever did was entitled to a verdict. Then the juror asked the following question: "Is that supposed to govern all the

other instruction?" when the court immediately answers, "Oh, no; only in part." To all of which the plaintiff excepted.

In this connection, therefore, we submit that the court erred in refusing to instruct the jury as prayed for in the instruction set out on page 43 of the Record, specifications Nos. 12 and 13. The court thus refused to instruct the jury upon one of the most vital points of the case, but did instruct them that all a locator could take would be three hundred feet from the *point of discovery*, regardless of where the vein ran, whether across or along the length of the location (Rec. p. 42).

The court also erred in giving the second of defendants' instructions. The jury were there told that a locator is not allowed to hold more than three hundred feet on each side of the middle of the vein or lode. This much is correct. But they were further instructed (Rec. p. 39, specification 23) that if Devine included more than three hundred feet within his stakes on the northerly side of the point of discovery at the time the notice was posted, his location was void as to the excess over three hundred feet, and that if such excess was *originally* included within the boundaries of the Emma location, it belonged to the Emma location, provided the evidence showed that the Emma location was valid. This instruction is radically erroneous. In the first place, why should the court say that they could measure three hundred feet on the northerly side of the point of discovery? Why might there not be an excess of three hundred feet on the easterly side, or the westerly side, or the southerly side? In effect the jury were told that Devine could claim no more than three hundred feet, measuring from the point of discovery in any direction, making a parallelogram six hundred feet square. This certainly is not justified by any construction of the act of Congress or any mining law.

The court below ignored the fact that the testimony showed that the vein ran from the discovery point north and south; and if Devine had six hundred feet of that vein included within his boundaries, he was entitled to that much of it. The true rule is that he was entitled to no more than three hundred feet on each side of the middle of his vein. In the case of Gleason *v.* Martin White M. Co. (13 Nev. 442), in reviewing the cases where locations might be across the vein, the court says that the argument that a party might not, when he first discovered the vein, be able to tell the direction it ran, is no obstruction to the construction of the mining act of Congress, and unless the miners voluntarily restrict themselves by local regulations a claim may be always fifteen hundred feet long by six hundred feet wide.

North Noonday Case, *supra.*

Argentine *v.* Terrible, 122 U. S. 485.

Under the act of May 10, 1872, while the vein is the principal thing located, the surface being incident thereto, still the location is a piece of ground including the vein. Therefore, where a locator has so fixed his claim that he afterwards discovers that he has located the same across the trend thereof, he is certainly entitled to the width of it, if the vein crosses it, to the extent at least of six hundred feet, for, as the supreme court of Nevada says, he could not under such circumstances possibly get less than six hundred feet of the vein.

The court further says in that case that if the discoverer sets his stakes without stopping to trace the vein he is better off under the new law than he was before, because his surface lines will necessarily include at least six hundred feet of the vein, and may include upwards of one thousand six hundred. In the latter case he may be com-

pelled to readjust his lines so as to take fifteen hundred feet, but in any case he can secure six hundred feet. Before the act of 1872, he could claim no more than four hundred feet of the vein, and of that he was not secure for a day. The moment he developed rich ore he was beset by trespassers, and in order to enjoin them from appropriating his property he was obliged to trace the vein between them and the location point. Under the present law this source of vexation and expense is entirely swept away. Within his surface lines the discoverer of a vein is secure, and he might well consent to sacrifice something in the extent of his claim for the sake of that security.

Therefore we submit that when the Emma locators came within the boundaries of the Stemwinder they were trespassers, and the question of excess as submitted to the jury by the court was erroneous, and defendants' instruction (Rec. p. 42, specification 11), then, is no better, because in that the jury was told that if the discovery of the Emma mining claim was within the excess they should find that it was not made within the boundaries of the Stemwinder mining claim. This instruction proceeds upon the theory that, no matter which way the vein runs, the point of discovery is the centre from which the locator must measure his three hundred feet in any direction. In this connection we insist that the instructions marked "refused" by the court (specifications 12 and 13, Rec. 43, also Rec. 187), which were requested to be given by the plaintiff, should have been given to the jury.

When the jury returned into court, at 3 o'clock, juror Sage asked the court "Do you mean the middle of the vein or the discovery shaft?" the Court replied, "At the time of the location the measurement must be from the point of the discovery—the middle of the point of discovery." (Rec. 42.) Then the court told the jury that

the party was entitled to three hundred feet on each side of the middle of the vein at the point of discovery, regardless of how the vein ran.

The crucial point of the case was here reached. The locations as made, both of the Stemwinder and Emma, were from west to east, and were supposed to be made on two separate veins, and as shown by the evidence, and admitted by the Emma in its notice of location, the Stemwinder has the prior location. The Emma location was totally void in this—that the discovery of the Emma was within the lines of a claim already located.

Little Pittsburgh Mining Co. *v.* Aimee, 17 Fed. R. 57.
Faxon *v.* Bernard, 4 Fed. R. 702.
Jupiter Mining Co. *v.* Bodie Con. Mining Co., 11 Fed. R. 666.
Fuller *v.* Harris, 29 Fed. R. 814.
Belk *v.* Meagher, 104 U. S. 279.
Eilers *v.* Boatman, 1 West Coast R. 632.
Weise *v.* Baker, 2 *Id.* 108.
Du Pratt *v.* James, 3 *Id.* 651.
Cowell *v.* Lammers, 21 Fed. R. 200.

Hence the efforts of defendant to fix the discovery of the Emma more than three hundred feet to the north of the discovery of the Stemwinder. Hence the instruction asked by the defendant and given upon that point. But the evidence showed on both sides that the vein ran north and south instead of east and west; that the discovery of both the Emma and the Stemwinder were on one and the same vein and not on separate veins, and that the locations of both claims being made from the west to east, were made across and not along the vein, and, lastly, that the distance from the one side line to the other as located upon the ground of the

Stemwinder was not more than 600 feet, and that not more than 600 feet of the vein along its course was embraced within such lines.

This being the fact, the instructions given at the request of defendant were clearly error, independent of the refusal of the court to give the instruction asked by plaintiff upon the return of the jury. It was for the jury to decide whether the location was laid across or along the vein. If they found the former (which was clearly the fact), then the side lines of the Stemwinder became the end lines of the claim, and the plaintiff was entitled to the whole of the length of the vein lying between those lines, and hence the discovery of the Emma being within those lines, it mattered not whether 300 feet or more distant from the discovery of the Stemwinder, the location of the Emma was void. The middle of the vein had nothing to do with the question as it then stood. Three hundred feet from the middle of the vein, whether measured from the discovery shaft of the Stemwinder or not, the vein running north and south, could be measured only at right angles to the trend of the vein, and would be a line running east and west. The court by this instruction assumed that the vein ran east and west, and if the Emma discovery was more than 300 feet north from the middle of the discovery of the Stemwinder, although the Stemwinder was a prior location, the defendant was entitled to the ground in dispute; that no matter how the vein ran, the middle of the vein meant the middle of the discovery, and the vein must run in the way the ground was located, and that the side lines remained side lines, irrespective of the trend, course, or strike of the vein. Such, however, is not the law.

Side lines and end lines are not arbitrary terms. Each have certain functions to perform, and become either end

or side lines, irrespective of their position upon the ground at the time of the location, as the exigency arises calling these functions into play.

"The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface." They are allowed to be 300 feet and shall not be less than 25 feet on each side of the middle of the vein. It is this surface ground thus marked, that passes by the location, with the exclusive right of possession to the locator, and also all veins whose apex or top lies within them.

Sec. 2320, Rev. Stat. U. S.

"The statute undoubtedly contemplates that the location of a vein shall be along the course of the lode or vein."

Argentine Co. *v.* Terrible Co., 122 U. S. 485.

"The longest sides of the claim are not necessarily the side lines. Such, undoubtedly would be the case, if the locations of the claim were along the course or strike of the lode."

Id.

Side lines are only such when they perform the function of measuring the distance from the middle of the vein on each side. In contemplation of law they must run parallel to the course or strike of the vein. If they should cross the course of the vein they cease to be side lines and become end lines.

If, by reason of the vein running north and south instead of east and west as supposed at the time of the original location, the side lines of the Stemwinder became the end lines, the Stemwinder was entitled to all the ground along the course of the vein lying between these lines, for there was no excess, the claim at

that point being less than 600 feet in width, as originally located.

By the survey of the amended location of the Stemwinder it appears that plaintiff claims less than 600 feet of the vein, including area in conflict.

McEvoy *v.* Hyman, 25 Fed. Rep. 600.
Mining Co. *v.* Tarbet, 98 U. S. 463.
Argentine Mining Co. *v.* Terrible Co. 122 U. S. 478.

The testimony in the case shows that the vein located as the Stemwinder, and also upon which the Emma location was made, is the same vein and runs north and south on the line indicated on the map.

Testimony of Burke, engineer, Rec. 69.
Testimony of Loring, engineer, Rec. 63.

There is no dispute about the direction of the vein, nor can it be denied that the amended location of the Stemwinder was within the lines of the original location of Devine. The amended location was therefore valid in its entirety.

Respectfully submitted.

ALBERT HAGAN,
S. S. BURDETT,
Attorneys for Plaintiff in Error.

149 U.S. 789

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR A

WRIT OF CERTIORARI,

UNDER THE ACT OF MARCH 3, 1891, IN THE CASE OF

THE UNITED STATES, APPELLANTS,
vs.
THE STEAMSHIP ITATA, HER TACKLE, apparel, furniture, etc.,

NOW PENDING IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES

IN SUPPORT OF PETITION.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR A

WRIT OF CERTIORARI,

UNDER THE ACT OF MARCH 3, 1891, IN THE CASE OF

THE UNITED STATES, APPELLANTS,
vs.
THE STEAMSHIP ITATA, HER TACKLE, apparel, furniture, etc.,

NOW PENDING IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF FACTS.

The facts of this case as found by the court below are set out in the opinion made a part of the record filed with the petition (Record, pp. 30–44) and again in the petition herein and it is assumed need not be repeated here.

In brief it is shown that the *Itata*, originally an ordinary merchant vessel, had, at the date of the happening of the events complained of, been captured by the Congressional party, a party engaged in an effort to overthrow the then established and recognized Government of Chile, with which Government this nation was at peace. Being thus captured, the vessel was put in command of one of its officers and used as a transport to convey troops, provisions, and munitions of war. Four small cannon were also put upon her decks and she carried a jack and pennant. She was sent to the harbor of San Francisco under the command of an officer of the *Esmeralda*, a so-called war ship belonging to the insurgent forces.

She was not in command of a master, nor did she do any act that would, in the remotest degree, tend to show that she was engaged in any commercial enterprise. It is true that she represented to the customs officers at San Diego that she was an ordinary merchantman and was bound to some port on the northern coast, but inasmuch as this representation is found by the court to have been false, it is a circumstance to be considered against the vessel under well-settled principles of construction amply sustained by authorities, as are likewise the facts found that she hauled down her jack and pennant, stowed away in her hold the cannon theretofore carried on her decks and also the arms of the soldiers on board, removed their uniforms, as also those of the officers, who all, when in our waters, appeared in civilians' dress. She did nothing honestly as a commercial vessel engaged in a lawful mission would have done. Even the coal and stores of provisions

bought of our merchants were marked in the name of the *Esmeralda*, the war ship whose captain was in command, and which had escorted her upon her way.

The effect of these actions, as evidential facts bearing upon the character of the vessel and the intent of those concerned in supplying her with munitions of war, is discussed later.

Prior to her arrival at San Diego, an agent of the insurgent forces had bought in New York 5,000 rifles and 2,000,000 cartridges. The evidence clearly establishes, and it is so found by the court, that the shipment to California and the arrival of the *Itata* off the coast of that State were in accordance with a prearranged plan of the insurgent powers, and consequently all should be considered together in reaching a determination as to the true nature of the transaction.

It is to be noted that these arms were not purchased or put in course of shipment with any purpose of re-sale. They were not destined to any merchant of Chile, and the parties had no intention that they should become a part of the mass of goods subject to sale in the territory occupied by the insurgents. It is admitted that the purchase by Trumbull, in New York, of the arms company, and the delivery to him there, was a commercial transaction, but it is contended that from the time of such delivery it would be a misnomer to speak of these goods as a subject of commerce. The court below seemed to think the armament of this vessel so slight that it could not reasonably be held to be a war vessel or capable of cruising or committing hostilities against the Government of Chile, and

also held, in effect, that to carry arms to the insurgent forces on land constituted no offense known to our laws.

We deny both conclusions for reasons given later.

The court also found as matter of fact that the *Itata*, after its seizure, by direction of the Attorney-General, on the 6th day of May, 1891, without obtaining clearance papers, and against the protest of the person left on board and in charge of her by the marshal of the southern district of California, weighed anchor and steamed out of the harbor of San Diego to meet the *Robert and Minnie*, a vessel engaged by the agent of the Congressional party to carry the arms to the *Itata*. "While steaming out of it [the harbor] one or both the *Itata's* cannon were brought on deck and some of the soldiers appeared in uniform." (R., 33.)

The court also found (R., 45),

> On September 4, 1891, the Congressional party was recognized by the Government of the United States as the established and only government of Chile. Prior to that time there had been no recognition of that party by this Government, other than that, on March 4, the Secretary of the Navy, cabled Admiral McCann "to proceed to Valparaiso, and observe strict neutrality, and take no part in troubles further than to protect American interests." On March 26 the Secretary of the Navy cabled Admiral Brown, who had superseded Admiral McCann, "to abstain from proceedings in nature of assistance to either, that is, the Balmaceda or Congressional party; that the ships of the latter were not to be treated as piratical so long as they waged war only against the Balmaceda government." On April 25, Secretary of State Blaine cabled the American min-

ister "You can act as a mediator with Brazilian minister and French chargé d'affaires." On May 5 Minister Egan cabled this Government, "Government of Chile and revolutionists have accepted mediation of the United States, Brazil, and France most cordially; those of England and Germany declined." On May 7, Acting Secretary of State Wharton acknowledged the dispatch of Minister Egan, and "expressed hope that through combined efforts of the governments in question the strife which has been going on in Chile may be speedily and happily terminated." On May 14 Acting Secretary of State Wharton cabled Minister Egan that "French minister reports threats to shoot the insurgent envoys by Balmaceda," and directed that they should have ordinary treatment under flag of truce.

The record shows that the *Itata* escaped, forcibly putting ashore the custodian placed in charge upon her seizure. She was surrendered at Valparaiso to a war ship of the United States, and was by the *Charleston*, a public armed vessel of the United States, brought back to a port of the United States. Bond was given, evidence taken, a trial had, and the libel was dismissed, from which decree the United States appealed to the United States Circuit Court of Appeals for the Ninth Circuit, where the cause is now pending and undetermined, and from which court the Government, with the concurrence of the opposing counsel, seeks by writ of certiorari to remove the record to this Court.

II.

THE REAL CHARACTER OF THE ITATA.

It is contended on behalf of the United States that the vessel was piratical, and as such had no right in our waters,

except in a case of distress involving such overwhelming necessity that the dictates of humanity would overcome the law of nations and our own municipal law. No such case is under consideration. There had been no recognition of these revolutionists. It may be said that the several dispatches by the Secretaries of the War and Navy Departments involve the recognition of a state of war and of belligerent rights. We think not, because they were evidently intended simply to regulate the action of our representatives in foreign ports, and have no reference to this vessel. They are not in any way public notice of the attitude of the Executive Department of our Government. It would be more reasonable to construe the action of the Attorney-General directing the seizure of the vessel, as evidence of a refusal to accord belligerent rights, as this was a positive act against the alleged belligerents, while the other dispatches were mere instructions to the agents of the Government to refrain from action.

The question whether these people were pirates and robbers in the eye of the law, or possessed of belligerent rights, is dependent upon the fact of recognition by the political department, or the absence of it. The question is not for the courts, and is discussed more at length under another head.

It is also discussed with so much learning in the case of *The Ambrose Light* (25 F. R., 408, 428–447), that we refer to that case and the full citation of authorities there found.

That they were considered piratical by the court below is shown by the following quotation from the opinion of the learned judge (Record, p. 35).

> It is contended on behalf of the defendants that section 5283 has no application to this case for the reason that the people designated in the indictment as the Congressional party do not constitute a "people" within the meaning of that section. It is beyond question that the *status* of the people composing the Congressional party at the time of the commission of the alleged offense is to be regarded by the court as it was then regarded by the political or executive department of the United States. This doctrine is firmly established. (*Gelston* vs. *Hoyt*, 3 Wheat., 246–324; *U. S.* vs. *Palmer*, 2 *id.*, 610–635; *Kennett* vs. *Chambers*, 14 How., 38; *Wharton's Int. Digest*, pages 551–2, and cases there cited.)
>
> If the dispatches from the Secretary of the Navy, the Secretary of State, and Acting Secretary of State, already referred to, are to be considered as indicating the light in which the people composing the Congressional party of Chili were regarded by the Executive Department of this Government prior to their recognition on the 4th of September, the position of the United States towards them seems to have been similar to that taken by the United States towards the insurgents in Hayti in 1869. That position was thus stated by Mr. Fish, then Secretary of State, in a letter dated September 14, 1869:
>
> "1. That we do not dispute the right of the Government of Hayti to treat the officers and crew of the *Quaker City* and *Florida* (vessels in the service of the insurgents against Hayti) as pirates for all intents and purposes. How they are to be regarded by their own legitimate government is a question of munici-

pal law into which we have no occasion, if we had the right, to enter.

"2. That this Government is not aware of any reason which would require or justify it in looking upon the vessel named in a different light from any other vessel employed in the service of the insurgents.

"3. That regarding them simply as armed cruisers of the insurgents not yet acknowledged by this Government to have attained belligerent rights it is competent to the United States to deny and resist the exercise by those vessels or any other agents of the rebellion of the privileges which attend maritime war in respect to our citizens or their property entitled to their protection. We may or we may not at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right and recognize, where facts warrant it, an actual intent on the part of the individual offenders not to depredate in a criminal sense and for private gain, but to capture and destroy *jure belli*. It is sufficient for the present purpose that the United States will not admit any commission or authority proceeding from rebels as a justification or excuse for injury to persons or property entitled to the protection of this Government. They will not tolerate the search or stopping by cruisers in the rebel service of vessels of the United States, nor any other act which is only privileged by recognized belligerency.

"4. While asserting the right to capture and destroy the vessels in question, and others of similar character, if any aggression upon persons or property entitled to the protection of this Government shall recommend such action, we can not admit the exist-

ence of any obligation to do so in the interest of Hayti or of the general security of commerce." (Whart., Int. L. Dig., Vol. 3, p. 465–6.)

The court continues:

> Does section 5283 of the Revised Statutes apply to any people whom it is optional with the United States to treat as pirates? That section is found in the chapter headed "Neutrality," and it was carried into the Revised Statutes and was originally enacted in furtherance of the obligations of the nation as a neutral. The very idea of neutrality imports that the neutral will treat each contending party alike; that it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other.
>
> In the case of the *United States* vs. *Quincy* (6 Peters, 443), the Supreme Court of the United States said that the word "people," in the third section of the act of April 20, 1818 (and from that carried into the Revised Statutes as section 5283), "is one of the denominations applied by the act of Congress to a foreign *power*." This can hardly mean an association of people in no way recognized by the United States or by the government against which they are rebelling, whose rebellion has not attained the dignity of war, and who may, at the option of the United States, be treated by them as pirates. Prior to the passage of the act of April 20, 1818, the Supreme Court of the United States, in the case of *Gelston* vs. *Hoyt* (3 Wheat., 245), speaking through Mr. Justice Story, held that section 3 of the act of 1794, prohibiting the fitting out any ship, etc., for the service of any foreign prince or state, to cruise against the subjects, etc., of any foreign prince or state with which the United States were at peace, did not apply to any

new government, unless it had been recognized by the United States, or by the government of the country to which such new country belonged. And that a plea which set up a forfeiture under that act, in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad.

Congress in passing the subsequent act of April 20, 1818, by which the provision referred to of the act of 1794 was, in substance, reënacted, must be presumed to have known the construction that had been theretofore put by the Supreme Court upon the words "prince or state" in the act of 1774, and with that knowledge, in passing the act of 1818, inserted in the same clause the words "colony, district, or people." This was done, according to *Dana's Wheaton* (sec. 439, note 215) and *Wharton's Int. Dig.* (p. 561), upon the suggestion of the Spanish minister that the South America provinces then in revolt, and not recognized as *independent*, might not be included in the word "state." But in every one of those instances the United States had acknowledged the existence of a state of war and, as a consequence, the belligerent rights of the provinces. (*The Ambrose Light*, 25 Fed. Rep., 414, and references there made.)

It will be observed that the Supreme Court in the case of *Gelston* vs. *Hoyt* did not say that the *independence* of the new government must have been recognized by the United States to make the statute of which it was speaking applicable. There are different kinds or degrees of recognition, but can it be properly said that in passing an act in furtherance of the obligations of the nation as a neutral, Congress was legislating with reference to a people not in any way recognized by the Government of the United States, and whom it might, at its option, treat as pirates?

This view of the *status* of the vessel is illustrated by the following quotations from the case of *The Ambrose Light* (25 F. R., 408, 418, 420):

> The recognition by foreign states of a state of war in civil strife, or, what is the same thing, a recognition of the belligerent rights of the insurgents, authorizes courts of law to treat the insurgents as lawful combatants. In the language of Burke, "It is an intermediate treaty that puts rebels in possession of the law of nations." It gives them temporarily, and for war purposes, the *status* of an established nation, and all the rights of public war. On the one hand it is a concession to rebels in the interest of humanity and expediency. On the other hand, since recognition of belligerency is not usually accorded till rebellion rises to the dignity of real war, and in its general aspects is fairly entitled to belligerent rights, notwithstanding the burdens it inflicts on other nations, it may be viewed as an adjustment by foreign nations of their own relations, so as to accord with the just requirements of the actual facts. If recognition be granted, it relieves the parent state from all responsibility for damages for any irregularities or violence committed by the other belligerent. * * *
>
> Until some recognition by the political department, express, implied, or tacit, of new conditions in foreign states, there is no "open war," no "belligerent;" there are no "enemies" that the court can recognize, but only insurgents. Under such circumstances no legal validity can be allowed in courts of law to the commissions given by such insurgents. In the case of *United States* vs. *Klintock* (5 Wheat., 144), on an indictment for piracy committed in 1818,

it appeared that the privateer sailed under a *commission* from one Aury. Chief Justice Marshall said (p. 149):

"So far as this court can take any cognizance of that fact, Aury can have no power, either as a brigadier of the Mexican Republic—*a republic of whose existence we know nothing*—or as generalissimo of the Floridas—a province in the possession of Spain—to issue commissions to authorize private or public vessels to make captures at sea."

Upon the facts found, and in view of the executive action directing the seizure of the *Itata*, her escape and practical recapture by an armed vessel of the United States and return to our ports, it is presumed by executive order, it is confidently urged that she can not be considered as belonging to any belligerent power.

III.

THE DUTY OF THE UNITED STATES.

a. As a question of international law.

b. As a question of municipal law.

(*a*) It is found as a fact by the court below that—

No evidence was introduced tending to show that the Congressional party ever received any recognition of any character from the Government of the United States until September 4, when it was recognized as the established and only government of Chile.

This quotation is found in the Record, page 33, and is a part of the decision *In re* Trumbull. The cases were

heard together, and upon the same evidence, and are properly, as we submit, to be considered as a part of the *Itata* case, although no appeal can be prosecuted so far as the acquittal of Mr. Trumbull is concerned.

The duty of neutrality is now a recognized principle of international law. It does not consist merely of non-intervention. Intervention is a positive act, unequivocal in its character. If attempted in aid of Chile, but without the request of that Government, it would have been officious and perhaps unwelcome. If in aid of the insurgent or rebel forces, it would have been an espousal of their cause and an act of war against the Balmaceda Government. As was said by the counsel for the United States in the Alabama case—

> But, if a nation abstains from intervention in the conflict between a sovereign nation and its rebels, it is inaccurate to treat this *abstinence* as *neutrality*. It is simply an unbroken maintenance of the international relations which subsisted between the two powers before the domestic peace of one of them suffered disturbance. It would shock the moral sense of civilization to speak of the United States as standing *neutral* between Great Britain and the Sepoy rebellion in India, or of Great Britain as standing *neutral* between the commune of Paris and the Government of France.
>
> But when the actual hostilities in which a government is engaged, in the suppression of a rebellion, encroach upon the established relations between it and friendly powers, the latter have presented to them the question whether they will, each for itself, acquiesce in the exercise of belligerent powers, as sought to be made effective against the rebels, at the

cost of interference with the peaceful rights of commerce and intercourse which subsisted before the nation was brought into this stress by its domestic rebellion.

But this question, under the rules governing the subject in the modern law of nations, can have but one answer. The nation which has superadded belligerent rights to those of sovereignty is entitled so to do, and resistance by other nations to the fair consequences of such rights upon their interests is a violation of the law of nations, and an unjust intervention in the domestic conflict.

In regard to the hostilities prosecuted against the sovereign by the rebel, if they should pass beyond the bounds of intestine war and obtrude themselves upon the notice of other sovereign powers, the actual occurrences which raise the question of their treatment by such powers may be trusted also to solve it. If the rebels should exhibit their strength by a blockade of any of the ports of the nation, or should keep the seas with cruisers, and assert the right of search, of capture, and of prize condemnation against the ships or cargoes of another nation, the power thus affected will determine for itself how it will treat this new disturber of its peaceful rights and interests. It has no *antecedent* obligations of friendship, of treaty, or of recognition even, which compel it to acquiesce, under the law of nations, in the legitimacy of this violence. It may pierce by force the rebel blockade which impedes its commerce, resist and resent the search and capture which threaten its maritime property, and reject the asserted prize jurisdiction as working no change of title. And it may do all this without, in the least, taking part in the hostilities of the government against the rebels or espousing its cause, but simply in maintenance of its own rights and interests.

> Undoubtedly, it is competent for other nations upon whose notice the hostilities of rebellion, revolution, or revolt may obtrude themselves, to yield such assent and submission to their exercise, to the disturbance of their own rights and to the disparagement of their own interests, as, under sentiments of justice, fair play, or humanity, they may find an adequate motive for.
>
> This course tends to, and naturally results in, a tacit toleration of this violence as in the nature of belligerent power, because it is practiced in that sense and under that justification by those who exert it. Placed, then, between the contending parties in the attitude of obligatory submission to the belligerent right of the sovereign, and of voluntary tolerance of the belligerent practices of the rebels, other nations fall gradually into an equality and impartiality in dealing with the rightful belligerent power and the *de facto* belligerent force, which assimilates itself to the *status* which, between two rightful belligerent powers, is called, in the law of nations, *neutrality*. (3 Geneva Arbitration, pp. 8, 9.)

It is to be remembered that at this time the United States had done no act tending to accredit the rebellion in Chile, without which the persons engaged therein had no belligerent rights as to this Government; until such rights were accorded them, all warfare conducted by that people upon the ocean bore the legal character of piracy, and upon land, that of robbery. As pirates, they were without the pale of the law, and in theory the power of every nation was to be exerted against them. At this time, therefore, it was not the duty of the United States, under the rules and principles of international law, to accord to these people in rebellion the same privileges as to

the recognized Government of Chile; with one, there could, at this time, be no legitimate trade or commerce as such; with the other, the right so to trade was unlimited, so far as international rules and principles are concerned.

Perhaps this is more clearly expressed in this way: The executive branch of this Government not having yet recognized the existence of the *de facto* belligerent force, the merchants of the country were at liberty to trade with any persons residing in any part of the Government of Chile; and therefore the sale of merchandise for shipment to Chile, to there become a part of the merchandise of that country, was a lawful transaction, as would have been the sale of merchandise to the Government of Chile. If, by proclamation or other action of the executive branch of the Government, the party known as the Congressional party had received the recognition of belligerents, then perhaps a sale to that *de facto* organization would have been proper under the principles of international law as construed in the interest of commercial freedom, and even if the sale consisted of articles of war.

We say *perhaps*, though it is submitted that the tendency of modern times is to condemn trade in such articles by neutrals as between belligerent forces, a tendency more in accord with the enlightened spirit of the age in which we live. We do not feel that it is necessary for us to admit the proposition or that its discussion is pertinent to the issues involved in this case, for we have here to deal with a sale not to a recognized power or to a people with which our country was at peace, but to a rebel people without rights of belligerency, mere pirates or robbers, who

were about to take munitions of war in a boat owned by them from our waters to engage in a warfare upon a friendly power.

The question is, was it the duty of this Goverment to allow such an expedition to leave its waters?

There is therefore no question of neutrality, as that term is known in international law, which only exists between belligerents—a *status* composed of a rightful belligerent power or a *de facto* belligerent force made so by recognition.

In so far as the Executive of the United States had acted it had been to the effect of denying the existence of this *de facto* power. This record discloses the fact that the Attorney-General directed that steps be taken to prevent the contemplated assault on the commerce and land forces of a friendly power by the seizure of the vessel.

This was executive action, and must be imputed to the President and his official advisers as a body. With that action as a refusal to then recognize the existence of a *de facto* belligerent force, it is submitted the judicial power has nothing to do; in the wise adjustment and distribution made by the founders of our system of government there is no one fact more clear than that the judiciary has no power to direct executive action in reference to our foreign relations. The courts can, in some instances, as in this case, determine whether the facts warranted the executive action. This right of course exists only as applied to the investigation of property rights, and has no bearing upon questions of judgment and discretion.

In the case at bar the court will hardly feel called upon to hold that the Congressional force as it is now known had then the rights of belligerents; a conclusion which must, we respectfully submit, be first reached before it can be held that it was the duty of this Government to allow the *Itata* to proceed on its course with its load of munitions of war.

The distinction has been sometimes overlooked, but rests upon the plainest dictates of expediency and justice. Until recognition is accorded the rebels by other nations, they are not waging war or engaged in a contest for maritime supremacy, but are merely robbers and pirates, having no belligerent rights.

If the peace of the world is to be preserved, attacks by a people of this character must not be supported, aided, or assisted by other nations. To do so is *casus belli*. When, however, the rebellion has grown to such proportions, and by the exercise of its force it has assumed such dignity, that the executive and legislative branches of the Government choose to recognize the condition as that of war, the dictates of humanity and the interests of trade lead to the recognition of belligerent rights.

By this course the horrors of war are greatly lessened, and the right to trade with the entire people is admitted, subject only to capture by the belligerent force as contraband of war. Until such recognition the insurgent force is one which can not be dealt with as an entity without violating moral, political, and legal duties.

It follows, logically, we submit, from the principles we have asserted, that at this time the same rights could not be accorded the *Itata* as a vessel belonging to an unrecog-

nized political force as could rightly be extended to a vessel belonging to the friendly Chilian Government. This distinction has no reference to mercantile vessels belonging to private parties.

It remains to determine what are the rights of vessels owned by a recognized government. The most important of these privileges is the concession of continual territoriality of the state to which the vessels belong—

> And a consequent exemption from the *jurisdiction of the courts and process* of the nation whose ports or waters they visit. But the same reason which gives support to this immunity throws them under the immediate political treatment of the hospitable state, as represented by its executive head, in the conduct of this international, if subordinate, relation. How, under the circumstances of each case calling for executive action, the vessels are to be dealt with is determined, in the first instance, by the government having the occasion to exhibit the treatment. For its decision, and the execution of it, it is responsible, politically and internationally, and not otherwise, to the sovereign whose public ships have been so dealt with. That, ordinarily, the offense calling for remonstrance or intervention would not be made the subject of immediate and forcible correction, applied to the vessel itself, but would be brought to the attention of its sovereign for correction or punishment and apology, or other amends, may be assumed. But all this is at the discretion of the power having occasion to exert, control, seek redress, or exhibit resentment. The flagrancy or urgency of the case may dictate another course, to be justified to the sovereign affected upon such considerations.
>
> When, however, the anomalous vessels of a belligerent, *not recognized as a nation or as a sovereign,*

claim a public character in the port of hospitality, the only possible concession of such character must, in subtracting them from judicial control, subject them to immediate political regulation *applied to the vessels themselves.* There is behind them no sovereign to be dealt with, diplomatically or by force. *The vessels themselves* present and represent at once whatever theoretical public relation exists or has been accepted. To hold otherwise would make the vessel wholly lawless and predominant over the complaisant sovereign, helplessly submissive to the manifold *irresponsibilities* the quasi public vessels assume to themselves.

The necessary consequence is that when the offending vessels of the non-sovereign belligerent have taken the seas only by defrauding or forcing the neutrality of the nation whose hospitality they now seek, such nation has the right, and, as *toward the injured nation demanding its action upon the offending vessels, is under the obligation to execute its coercive, its repressive, its punitive control over the vessels themselves.* It can not excuse itself to the injured nation for omission or neglect so to do by exhibiting its resentment against, or extorting redress from, any responsible sovereign behind the vessels, nor can it resort to such sovereign for indemnity against its own exposure to reprisals or hostilities, by the injured nation, or for the cost of averting them. (3 Geneva Arbitration, 153.)

The conclusion follows, upon the plainest principles of international law, as well as of sound reason and policy, that it was the duty of the United States to seize and condemn this vessel and cargo. To allow her to leave our waters with a cargo of muskets and cartridges, whether

for use on the sea in maritime warfare, or for the purpose of conveying them to insurgent associates in arms on land, would have made this Government liable in damages to the recognized Government of Chile. The principles asserted by the United States in the Alabama case, and sustained by the arbitrators, would make this the duty of a neutral between belligerent forces. This decision was only declaratory of the law of nations as it then existed, and in no sense a change or addition thereto. It is common knowledge, and needs no exemplification in this court, that the state of neutrality between belligerents confers a wider latitude of commerce than is accorded to pirates, against whom all nations and all men are supposed to be arrayed.

Again, this duty of the United States to seize and condemn as prize is sustained by precedent and by the leading writers on international law.

These principles are so clearly stated and the authorities so carefully collated, in the opinion of Judge Brown, of the District Court for the Southern District of New York, that we have attached liberal extracts therefrom as an appendix to this brief, and respectfully request that it may be considered as a part of our argument.

Assuming the vessel to be an armed vessel, it was subject to condemnation as prize under the law of nations; assuming that she was engaged in transporting the arms to the insurgent force in Chile, a like duty rested upon the United States, with like powers of enforcement under the laws of nations.

b. As a question of municipal law.

The duty of the United States under the law of nations being established, it remains to consider the question as one of municipal law. A condemnation as prize might have been had under the law of nations. This course was not adopted, and the proceedings were instituted under the municipal law for forfeiture.

It is submitted that such law is but declaratory of the law of nations, and is in all respects as comprehensive in its terms and objects as applied to the question at issue.

Sir Robert Phillimore thus states the duty of a nation standing neutral:

> It is a maxim of general law that, so far as foreign states are concerned, the will of the subject must be considered as bound up in that of his sovereign.
>
> It is also a maxim that each state has a right to expect from another the observance of international obligations, without regard to what may be the municipal means which it possesses for enforcing this observance.
>
> The act of an individual citizen, or of a small number of citizens, is not to be imputed without clear proof to the government of which they are subjects.
>
> A government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects whom it does not prevent from the commission of an injury to a foreign state.
>
> A government is presumed to be able to restrain the subject within its territory from contravening the obligations of neutrality to which the state is bound.
>
> The government of the owner of the captured property may, indeed, call the neutral to account for permitting a fraudulent, unworthy, or unnecessary

violation of its jurisdiction, and such permission may, according to the circumstances, convert the neutral into a belligerent.

In fact, the maxim adverted to in a former volume of this work is sound, viz, that a State is, prima facie, responsible for whatever is done within its jurisdiction; for it must be *presumed* to be capable of preventing or punishing offenses committed within its boundaries. A body politic is, therefore, responsible for the acts of individuals which are acts of actual or meditated hostility toward a nation with which the government of these subjects professes to maintain relations of friendship or neutrality. (3 Geneva Arbitration, pp. 20, 21.)

Quoting this, the eminent counsel of the United States in the Alabama Case contended:

Sir Robert Phillimore at a blow strikes to the earth the whole fabric of the British case and countercase in declaring that no government has a right to set up the deficiency of its own municipal law as excuse for the nonperformance of international obligations toward a foreign state.

He lays down the rule that a government may by *knowledge* and *sufference*, as well as by direct *permission*, become responsible for the acts of subjects (including commorant or transient aliens) whom *it does not prevent* from committing injury to a foreign state. This proposition is not presented by Sir Robert Phillimore as based on any express treaty stipulation, but as being the doctrine of the law of nations. As such it serves to construe the "due diligence" of the treaty of Washington.

In expounding the proposition of the impartiality requisite in the character of a bona fide neutral, he declares that such neutrality is violated by any act which *betters* or *strengthens* one of the belligerents, or

by any act which *gratifies* one of the belligerents. (3 Geneva Arbitration, pp. 21, 22, 23.)

This court has adopted the same high views, holding that the laws of "the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." (The *Amelia*, 1 Cranch, 1, 43.)

It will be remembered that in the case of the Alabama claims it was contended by the British Government that its liability was measured by its own municipal law, and if it had done all that was required by such law it had used due diligence and could not be held responsible for the depredations of the rebel cruisers fitted out from its ports. On the part of the United States it was contended that the test must be found in the law of nations; to hold otherwise would be equivalent to holding that if a nation had no municipal law upon the subject it would owe no duty to other nations. The arbitrators held with the American counsel.

It therefore becomes important to determine if the contention of the executive department of the Government in one of the greatest diplomatic and legal contests in which it has ever been engaged, fortified by the decision of the arbitrators at Geneva, was wrong; or, at least, to determine if the municipal law of the United States is inadequate to the discharge of its duty as a nation in the family of nations, contrary to the contention of the eminent counsel who there represented the Government. As we have seen, such conflict or inadequacy is not to be presumed. If, however, it exists, it should be known, that Congress may supply the defects.

Sections 5283, 5285, and 4294, Revised Statutes, are printed in the appendix to this brief. The first prescribes penalties against any person who fits out and arms, attempts to * * *, procures to be * * *, or is concerned in furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people to cruise or commit hostilities against the subjects * * *, are guilty of a high misdemeanor. The vessel, * * * munitions of war, etc., are forfeited.

We submit that furnishing, fitting out, and arming are not one and the same thing. Such tautological use of language is not to be imputed to the lawmakers. Within this language there is embraced, as we think, any act by which the ship is better qualified to render assistance to the people in whose service it is engaged. The language is general and comprehensive, connected by the disjunctive "*or*," and should be held to embrace not only arms, but every assistance to the purpose of the unfriendly ship, which is as much engaged in unlawful acts in making use of our ports to procure financial or military aid to the insurgent forces as in making war by sea on the commerce of the state with which the United States are at peace. Such acts are as well calculated to interrupt these friendly relations, which it is the purpose of these laws to maintain.

This construction is favored by the term to "cruise *or commit hostilities.*" What is meant by the words "or commit hostilities?" To confine it to attacks by the ves-

sel so furnished or fitted upon other vessels is to emasculate the law and do violence to the language used. It should be held to embrace any act calculated to sustain or strengthen the rebel forces, or aid the attempt to overthrow the established government. To carry food, arms, men to such a power is to "commit hostilities" against the established government, where, as in this case, there are no belligerent rights and no pretenses of commerce, the vessels and arms being owned by the insurgent people.

This view is sustained by the case of *The City of Mexico* (28 F. R., 148) and the cases there cited.

The right of blockade as asserted in *The Prize Cases* (2 Black, 635), and to treat all property in the enemy's country, or destined to enemy's ports, as enemy's property, proceeds upon this theory, and obtains, as there asserted, irrespective of the actual loyalty or disloyalty of the owner. Nations admit this right of capture even of neutral vessels engaged in such trade, on the ground that such property affords aid to the enemy and prolongs the contest. If this is true as applied to a neutral ship, certainly a vessel owned, officered, and manned by rebel forces engaged in carrying arms, let us admit for the sake of the argument, as found by the court, to the rebel land forces, was furnished to commit hostilities upon the Government of Chili.

This leaves only the question of intent. If correct in our definition of the meaning of the words "commit hostilities," any discussion of the question is unnecessary, as the fact is found by the court. Without dwelling upon this branch of the discussion, we submit that the ownership

of the vessel, the arms, the prearrangement by which the agent of the insurgents appeared in this country and made the purchase, the sending of the *Itata* with an armed convoy for a part of the way and under command of an officer of a war ship, with soldiers and cannon aboard, the flag, the subsequent concealment of arms, the change of dress, the false statements to the customs officer, the failure to give bond as required by law, the secret and circuitous methods adopted to take the cargo of arms, all show an unlawful intent too plain to admit of argument. Upon well-settled principles these circumstances weigh against the vessel, and are determinative of her character and purpose.

The question of intent is to be deduced from the acts of the vessel and those concerned in her fitting out. It is never necessary to show that the accused knew or thought that what he was doing was a crime. The law never admits the ultimate object or motive to be a justification where the means are unlawful. (*The Ambrose Light*, 25 F. R., 408, 426, 427.)

The character of the act and the motive inducing it are to be inferred from acts of deception and falsehood accompanying it rather than the testimony of the accused after detection and seizure. (*The Slavers*, 2 Wall., 350, 366, 375, 383; *The Luminary*, 8 Wheat., 407; *Clifton* vs. *United States*, 4 How., 242. *The Cornelius*, 3 Wall., 214.)

We have so far discussed this question as if the purpose of the *Itata* was to convey these arms and troops to the insurgent forces in Chili, as assumed by the court below. This is not conceded. The court seemed to suppose that the question was to be determined by a consideration

of the extent of the armament, and because he did not find a large force of men and cannon on board, and that the vessel was a formidable instrument for the destruction of commerce, therefore it was not an arming, etc. It is submitted that this is not the test. It is so expressly decided in *United States* v. *Gooding* (12 Wheat., 460,472). The court can not say that this vessel could not have captured or destroyed the merchant vessels of Chile. It can not, it is submitted, assume that these cartridges and muskets, nor any part of them, were not designed for use aboard ship. If that were a material point, and the most narrow construction of the statutes were to be adopted, enough facts had been shown to put upon the vessel the duty of clear proof upon this subject; as held in the case of the *Estrella* (4 Wheat., 208, 307).

> On the libellant, in the first instance, lay the *onus* of showing that the crew of the *Constitution* had been increased within the United States; having done this, it became incumbent on the captors, if they wanted to establish their innocence, to show, as was in their power if the fact was so, that they had done nothing contrary to law, by bringing their case within the proviso that has been mentioned.

It has been held that it is not necessary, under this act, that the vessel should have been armed, etc., while in the waters of the United States if the person initiating the attempt, or concerned in such arming or furnishing was within the limits of the United States, as Trumbull was. (*United States* v. *Quincy*, 6 Pet., 445; *United States* v. *Hogan*, 18 F. R., 529; *The Meteor*, 1 Am. Law. Rev., 401, 404).

We only mention this general ruling to show the spirit in which the court has sought to make the law coextensive with the law of nations upon the subject. In this case, the arms were actually transferred to the *Itata* within the limits of the United States.

It is, however, insisted that the recognized insurgents did not constitute a "people" within the meaning of the act. The history of the act is against such construction. As originally passed, it embraced only foreign princes or states. It was held that these words implied sovereignty, the supreme power of a state which could not be predicated of a people conducting hostilities with the hope of securing independence, but as yet unrecognized as a political power.

The view of the court below entirely ignores the history of the act and seems to need no refutation. It is admitted by us that the word is sometimes used in the sense of "nation," but its history and context in this act give it the general meaning authorized by the lexicographers.

The early law of 1794, the change in the present act by the addition of the words "colony, district, or people," and that the above is the proper interpretation are shown by reference to the following authorities: *Gelston* vs. *Hoyt* (3 Wheat., 246, 323, 324); 13 Op. Atty. Genl., 177, 179; 3 Wharton International Law Dig., section 396.

We conclude that the municipal law of the United States is as broad as the law of nations upon the subject of neutrality and aid to people in rebellion against a power with which this Government is at peace; that

there is no need of additional legislation to enable this Government to protect itself against violations of its duty under the law of nations, and consequent indemnity if violations occur along our coast; and that the facts of the case as found required that the libel should be sustained, and the vessel, her tackle, apparel, and furniture, together with the arms and ammunition on board, be condemned.

In fact, the greatest danger of our becoming involved in international difficulties or subject to damages arises from just such a condition of affairs as here existed. A power recognized among nations can be dealt with as such, and in the early stages of its existence will take care not to involve itself in controversies with established governments by infractions of the law of nations or of the municipal law, while an irresponsible, unrecognized power, unrestrained by any considerations of accountability, will, as in this case, resort to deception and force to accomplish its unlawful purpose. It is earnestly insisted that every consideration of public policy favors that meaning of the word "people," evidently intended by the legislative power when it was added to the act.

IV.

THE SUBSEQUENT RECOGNITION OF THE INSURGENT FORCE BY THE UNITED STATES.

It is insisted that the subsequent success of the insurgent forces and recognition by the United States should be considered by the court as validating the acts of the

Itata and those concerned in her fitting out, or at least should prevent a decree reversing the action of the lower court.

It is respectfully submitted that with that question this court has and can have nothing to do.

The right to condemn the *Itata* must be determined by the facts as they then existed. She was then either guilty or not guilty. The court can institute no inquiries into the *status* of insurgents; it must follow the political department of the Government. This is illustrated in numerous decisions. Thus Judge Nelson, in his charge to the jury in the case of *United States* v. *Baker* (5 Blatchf., 6, 14), said, speaking of the recognition of belligerency:

> It involves the determination of great public and political questions, which belong to the departments of our Government that have charge of our foreign relations, the legislative and the executive departments. When those questions are decided by those departments the courts follow the decision, *and* until *those departments* have recognized the existence of the new government the courts of the nation can not; * * * the courts are obliged to regard the ancient state of things as remaining unchanged.

He then refers to our acknowledgment of the independence of the South American Republics and adds:

> Prior to this recognition and during the existence of the civil war between Spain and her colonies, it was the declared policy of our Government to treat both parties as belligerents, entitled equally to the rights of asylums and hospitality, and to consider them, in respect to the neutral relations and duties of

> our Government, as equally entitled to the sovereign rights of war as against each other. This was also the doctrine of the courts which they derived *from the policy of the Government*, following the political department of the Government as it respects our relations with new governments erected on the overthrow of old ones.

In *United States* v. *Greathouse* (2 Abb. (U. S.) 364-380), Mr. Justice Field said:

> The courts * * * cannot treat any new government as having authority to issue commissions or letters of marque, which will afford protection to its citizens, until the legislative and executive departments have recognized its existence. The judiciary follows the political department of the Government in these particulars.

To exempt the *Itata* from forfeiture is not to follow, but to lead the political department. The latter acted in September, 1891; the court is asked to act from May, 1891.

The only safe and consistent rule, it is submitted, is to decide each case upon the facts existing at the time the act is done and leave to the other coördinate branches of the Government the settlement of all questions which subsequent events may give rise to. It may be safely assumed that, as in the *Wheeling Bridge Cases* (13 How., 518; 18 How., 421), if these events make it important or desirable to avoid the court's decision upon the law, the Legislative and Executive departments will find a way of satisfying the decree.

The importance of a construction by this court of the laws applicable in such case far outweighs the mere forfeiture of the vessel and is our excuse, if any is needed, for this lengthy presentation of our views.

W. H. H. MILLER,
Attorney-General.
CHARLES H. ALDRICH,
Solicitor-General.

APPENDIX.

(From the Ambrose Light, 25 F. R., 408, 412.)

* * * The consideration that I have been able to give to the subject leads me to the conclusion that the liability of the vessel to seizure, as piratical, turns wholly upon the question whether the insurgents had or had not obtained any previous recognizition of belligerent rights, either from their own government or from the political or executive department of any other nation; and that, in the absence of recognition by any government whatever, the tribunals of other nations must hold such expeditions as this to be technically piratical. This result follows logically and necessarily, both from the definition of piracy in the view of international law and from a few well-settled principles. Wheaton defines piracy as "the offense of depredating on the high seas without being authorized by any sovereign state or with commissions from different sovereigns at war with each other." (Dana's Wheat. Int. Law, § 122.) Rebels who have never obtained recognition from any other power are clearly not a sovereign state in the eye of international law, and their vessels sent out to commit violence on the high seas are therefore piratical within this definition.

The general principles of international right and of self-protection lead to the same conclusion. (1) All nations are entitled to the peaceful pursuit of commerce through the ports of all other civilized nations unobstructed save by the incidents of lawful war or by the just restrictions of the sovereign. (2) Maritime warfare, with its burdens and inconveniences to nations not en-

gaged in it, is the lawful prerogative of sovereigns only. Private warfare is unlawful. International law has no place for rebellion; and insurgents have strictly no legal rights, as against other nations, until recognition of belligerent rights is accorded them. (3) Recognition of belligerency or the accordance of belligerent rights to communities in revolt belongs solely to the political and executive departments of each government. (4) Courts can not inquire into the internal condition of foreign communities in order to determine whether a state of civil war, as distinguished from sedition or armed revolt, exists there or not. They must follow the political and executive departments and recognize only what those departments recognize, and, in the absence of any recognition by them, must regard the former legal conditions as unchanged.

From these principles it necessarily follows that in the absence of recognition by any Government of their belligerent rights, insurgents that send out vessels of war are, in legal contemplation, merely combinations of private persons engaged in unlawful depredations on the high seas; that they are civilly and criminally responsible in the tribunals for all their acts of violence; that, in blockading ports which all nations are entitled to enter, they attack the rights of all mankind and menace with destruction the lives and property of all who resist their unlawful acts; that such acts are therefore piratical and entitle the ships and tribunals of every nation whose interests are attacked or menaced to suppress, at their discretion, such unauthorized warfare by the seizure and confiscation of the vessels engaged in it.

The right of seizure by other nations arises in such cases *ex necessitate*, from the very nature of the case. There is no other remedy except open war, and nations are not required to declare *war* against individual rebels whom they are unwilling and not required to recognize as a belligerent power. Nor are other nations required, for their

own security, in such a case to make any alliance with the parent state. By the right of self-defense they may simply seize such lawbreakers as come in their way and menace them with injury. Without this right insurgents, though recognition were rightly refused them and however insignificant their cause or unworthy their conduct, might violate the rights of all other nations, harass their commerce, and capture or sink their ships with impunity.

The whole significance and importance of the doctrine of recognition of belligerency would be gone, since the absence of recognition could be safely disregarded; the distinction between lawful and unlawful war would be practically abolished; and the most unworthy revolt would have the same immunities for acts of violence on the high seas, without any recognition of belligerent rights, as the most justifiable revolt would have with it. The right to treat unlawful and unauthorized warfare as piratical seems to me, therefore, clearly embedded in the very roots of international law.

These considerations seem to me sufficient for the determination of this branch of the case. But, as the *right* of the Government to treat such acts as piratical is vehemently challenged and as doubt on this point has been expressed by some recent authors, I proceed to consider the subject more in detail.

It should be first observed that the case is not one where recognition of belligerency has been accorded by the parent government or by any other nation. The question here arises upon the entire absence of recognition anywhere. In this respect the case is unique in modern times. No rebels, so far as I am aware, have ever attempted to blockade ports and make an attack on the commerce of other nations without any previous recognition of their belligerent rights. In the case of the late Confederate rebellion President Lincoln, it will be remembered, treated the revolt almost from the beginning as a war waged against

the Government, and proclaimed a blockade of the Southern ports; a measure purely belligerent and which the Supreme Court, in the *Prize Cases* (2 Black., 635, 670), declare "was in itself official and conclusive evidence to the court that a *state of war* existed. (See also *Coleman* v. *Tennessee*, 97 U. S., 509, 517.) The principal maritime nations of Europe also made haste to recognize a civil war as existing, to acknowledge the South as a *de facto* government, and to proclaim their neutrality in the contest.

Again, in our Revolutionary struggle, nearly all the European powers, except Portugal, which was dominated by English influence, acted in a friendly spirit and as *neutrals*, admitting our cruisers freely to their ports, and thus by implication recognizing our belligerency (Lawr. Wheat., note 16, p. 41; Ann. Reg., 1776, pp. *182, *183; *Id.*, 1779, pp. 391, 409, 429). (See references in United States Messages and Documents, 1861, p. 371.) France, as early as 1776, expressly recognized our belligerent rights, and set at liberty a corsair arrested by procurement of the British vice-admiral (Ann. Reg., 1776, p. 261), while Portugal alone, by decree of June 4, 1776, refused us recognition, shut her ports to our merchantmen, and denounced confiscation of all our vessels found with contraband goods on board. (*Id.*, 260.)

In all the revolts and struggles for independence by the Spanish-American colonies from 1810 to 1822 our Government, at an early stage of the contest, in every instance acknowledged the existence of a state of war and of the belligerent rights of the provinces, maintained an impartial neutrality, and admitted to our ports the vessels of war of each party. (Message of President Monroe, March 8, 1822; Note to 4 Wheat., Rep. App., 23–59.) It was the same in the Greek revolution (see dispatch of Mr. Adams to Rush, August 18, 1823; 2 Elliott, Dip. Code, 633), and the same in the contest by which Texas

acquired her independence of Mexico (*Id.*, 643, 684). Greece blockaded the ports of Turkey; but England had already acknowledged her belligerent rights and declared her strict neutrality. (2 Stapleton's Life of Canning, 408, 414, 443.)

These are among the most prominent revolutionary struggles of recent times. In all of them the revolutionists were speedily recognized as belligerents by foreign powers long before any recognition of them as independent states. Even England in her statute of 16 Geo. III, 1776, and in that of 17 Geo. III, 1777, which was renewed annually during the war, and which declared our privateers "pirates," recognized and declared the existence of a *territorial civil war* whereby we became "enemies" and "belligerents" as well as "rebels" (per Nelson, J., in *Prize Cases*, 2 Black., 694; Lawr. Wheat., note, 79). In the long revolt of the Netherlands, Queen Elizabeth, from policy and re-religious sympathy, secretly aided the insurgents, and for twenty years, while professing amity with Philip, carried on a secret piratical warfare against him. (Hosack, Rise, etc., of Int. Law, 153.)

The foreign powers generally, says Lawrence (1 Com. de Droit, etc., 186), treated the Dutch corsairs as *belligerents*, though Spain regarded them as pirates. Until recognition as belligerents, insurgents have usually carefully abstained from interference with the rights of third powers. No instance has been called to my attention, and I have found none, though such cases may have arisen, in which insurgent leaders have undertaken to blockade ports to the exclusion of the legitimate commerce of all nations, prior to their obtaining any recognition of belligerent rights from abroad. All citations of supposed precedents that omit inquiry into this vital circumstance are likely to prove misleading.

Again, this is a suit *in rem* for the condemnation of the vessel only; not a trial upon a criminal indictment of

her officers or crew. The two proceedings are wholly independent, and pursued in different courts. Condemnation of the vessel as piratical does not necessarily imply a criminal liability of her officers or crew. The vessel might be condemned for being engaged upon a piratical expedition only, or for attempts at piratical aggression or restraint. In such a case no indictment for piracy would lie, because criminal punishment is inflicted only according to the municipal law of the captors; and our statutes do not make criminally punishable piratical undertakings or aggressions merely. (*The Marianna Flora*, 11 Wheat., 40; *The Palmyra*, 12 Wheat., 1, 15.) Even as regards acts that constitute undoubted piracy, there may be valid personal defenses of the officers and crew, as suggested, though not decided, by Marshall, *C. J.*, in *United States* v. *Klintock* (5 Wheat., 144, 149). If an owner should forge a commission from a lawful belligerent, and send his vessel out as a privateer under officers and crew who acted in good faith, supposing her commission to be genuine, the vessel should be condemned, though the officers and crew might be acquitted.

So if mere usurpers, knowing that they have no recognized authority, should commission their own ships as vessels of war to blockade loyal ports and to threaten the lawful commerce of all nations, and foreign merchantmen were captured or sunk by them during such a blockade, it is possible that the officers and crew might have accepted the commission upon such a reasonable supposition of its coming from an authorized belligerent as to furnish a just defense upon a criminal indictment, though none the less should the vessel and those who commissioned her be held engaged in an illegal and piratical expedition. (See *United States* v. *Gibert*, 2 Sum., 19.) Here the court has to do only with the character and design of the expedition upon which the *Ambrose Light* was sent out by the insurgents who owned and commissioned her. And, so far as

respects the lawfulness of her seizure, the question is the same as if she had actually captured one of our merchantmen, or sunk her and killed the officers and crew while they were lawfully entering the port at Cartagena.

1. Piracy has two aspects: (*a*) As a violation of the common right of nations, punishable under the common law of nations by the seizure and condemnation of the vessel only in prize courts; (*b*) its liability to punishment criminally by the municipal law of the place where the offenders are tried. Accordingly, the definitions of piracy, aside from "statutory piracy," fall naturally into two classes, according as the offense is viewed more especially as it affects the rights of nations, or as amenable to criminal punishment under the municipal law. The common-law jurists, and our standard authors on criminal law, define piracy as "robbery on the high seas," or "such acts of violence or felonious taking on the high seas as upon land would constitute the crime of robbery." (1 Russ. Cr., *144; 1 Bl. Comm., *72; Whart. Crim. Law, § 2830; Sir Charles Hedges, 13 How. St. Tr., 454; Sir L. Jenkins, 13 Petersd., 349, note; Phil. Int. Law, 414.)

The majority of authors on international law, however, define it substantially as Wheaton defines it, viz, as "the offense of depredating on the high seas without being authorized by any sovereign state; or with commissions from different sovereigns at war with each other." (Mann. Int. Law, 160; Hall, Int. Law, 218, and note; Bac. Abr., 163; 2 Browne, Civ. and Adm. Law, 461.) See numerous citations to same effect by R. H. Dana and [now Mr. Justice] Gray, *Dole* v. *New England Ins. Co.* (2 Cliff., 394, 400) and note to 5 Wheat., 157.

In several cases in the Supreme Court, pirates are spoken of as synonymous with "persons not lawfully sailing under the flag, or deriving protection from the commission of any government or nation" (*U. S.* v. *Smith*,

5 Wheat., 153, 163; *U. S.* v. *Holmes*, *Id.*, 412, 417; *The Malek Adhel*, 2 How., 211, 232); and the other common-law definition is also frequently used.

Prof. Perels, in his recent work on International Maritime Law (Berlin, 1882, § 16, p. 125), defines piracy generally in substantially the same terms as Wheaton, giving afterwards some twelve different forms of the offense. Among these are included making captures under a commission after the commission has expired or after it is revoked, or after knowledge that the war has ended, or outside the proper territorial limits of the war. (Piraterie, § 16; Caper, § 34, pp. 186, 187.)

Both the above general definitions, in most cases, lead practically to the same results. The latter is equally well established with the former, and is more appropriate in a case of prize. This definition makes piratical, and is intended to make piratical, all private, unauthorized maritime warfare. The reason is that all such warfare is incompatible with the peace and order of the seas, with due security for maritime commerce, or due responsibility for injuries to others. Ocean belligerency embraces the right to arrest, to visit, and to search the vessels of all nations; to seize contraband goods; to blockade ports; and, if need be, to capture or destroy the vessels of all nations that resist or violate the blockade. These are high prerogatives of sovereignty. (3 Phil. Int. Law, 2d ed., 474; Lawr. Wheat., pt. 4, c. 1, § 5; Hall, Int. Law, § 178, p. 448; Wools., Int. Law, § 116.) They are neither permitted to mere private persons, or combinations of persons, nor suffered by other nations at their hands.

Such private warfare is therefore everywhere held unlawful, and, as it involves the infliction of the highest injuries in the destruction of life and property, it is rightly held to be among the highest of crimes, and therefore piracy. There is no other offense that covers it It is either piracy or no offense at all. To show their right to

carry on such warfare, both privateers and public vessels of war are required to be duly commissioned by some proper authority, and to sail under their proper flags. One of the forms of piracy mentioned by Prof. Perels (Int. Mar. Law, § 16, p. 127) is "ships that sail without any flag, or without a flag sanctioned by any sovereign power, or that usurp a flag and commit acts of violence under it." And, again, "ships that carry on privateering without a commission." (Section 34, VIII, p. 185.)

Accordingly, our statutes authorize both our public vessels of war and our merchantmen to resist and to capture all such vessels (Rev. Stat., §§ 4294, 4295). Our naval regulations provide (1876, c. 20, § 18): "If any vessel shall be taken acting as a vessel of war or privateer without having a proper commission so to act, the officers and crew shall be considered as pirates and treated accordingly." The same are the English naval regulations. (Section 1861, Perels, Mar. Law, p. 185.) A commission by unrecognized rebels is manifestly not "a proper commission;" and if such vessels, whenever "taken," can not be detained as piratical, these naval regulations are unlawful.

SEC. 5283. Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand

dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States.

SEC. 5285. Every person who, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be deemed guilty of a high misdemeanor, and shall be fined not more than one thousand dollars and be imprisoned not more than one year.

SEC. 4294. The President is authorized to instruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States any armed vessel or boat, or any vessel or boat the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.

SEC. 4297. Any vessel built, purchased, fitted out in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure, or in the commission of any other act of piracy, as defined by the law of nations, shall be liable to be captured and brought into any port of the United States if found upon the high seas, or to be seized if found in any port or place within the United States, whether the same shall have actually sailed upon any piratical expedition or not, and whether any act of piracy shall have been committed or attempted upon or from such vessel or not; and any such vessel may be adjudged and condemned, if captured by a vessel authorized as hereinafter mentioned, to the use of the United States and to that of the captors, and if seized by a collector, surveyor, or marshal, then to the use of the United States.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR A

WRIT OF CERTIORARI,

UNDER THE ACT OF MARCH 3, 1891, IN THE CASE OF

THE UNITED STATES, APPELLANTS,
vs.
THE STEAMSHIP ITATA, HER TACKLE, apparel, furniture, etc.

NOW PENDING IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR WRIT.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR A

WRIT OF CERTIORARI,

UNDER THE ACT OF MARCH 3, 1891. IN THE CASE OF

THE UNITED STATES, APPELLANTS,
vs.
THE STEAMSHIP ITATA, HER TACKLE, apparel, furniture, etc.

NOW PENDING IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR WRIT.

To the honorable the Supreme Court of the United States:

And now, October 17, 1892, comes the United States, by W. H. H. Miller, Attorney-General, and respectfully shows and gives the court to understand and be informed:

First. That at the January term, A. D. 1891, of the district court of the United States in and for the southern

district of California there was filed, in the name and behalf of the United States, a libel of information against the steamship *Itata*, her tackle, apparel, and furniture, etc., by which it was shown to the said court that on the 8th day of July, A. D. 1891, and on waters which were navigable from the sea by vessels of 10 or more tons burden, the United States marshal for the southern district of California had, at the port of San Diego, in the State of California, and within the said southern district, seized the steamship called *The Itata*, and then had the same in his custody in the said port of San Diego, as being forfeited to the United States for the following reasons, to wit:

> For that theretofore, to wit, on the 8th day of May, 1891, within the limits of the United States, and upon waters of the Pacific Ocean, navigable by vessels of ten tons burden and upwards, and within the jurisdiction of the United States and within two miles from the island of San Clemente, an island within the limits of the State of California and within the jurisdiction of this court, one Pedro Mannzen, and divers other persons unknown, did unlawfully fit out and arm said steamship or vessel called the *Itata*, with intent that such steamship or vessel should be employed in the service of certain foreign people, viz, certain inhabitants and citizens of the Republic of Chili, then organized and banded together in large numbers and in great force, and engaged in open armed hostilities and attempted revolution against the Republic of Chili and the lawful government thereof, said insurgents being known as the Congressional party, to cruise and commit hostilities against the citizens and property of a foreign State, viz, the Republic of Chili, with which republic

the United States were then and now are at peace, contrary to the form of the statute in such case made and provided; whereby, by force of the statute in such case made and provided, the said steamship *Itata*, her tackle, apparel, and furniture became and are forfeited to the uses in said statute prescribed.

And also, for that theretofore, viz, on the 8th day of May, in the year 1891, within the limits of the United States, and on waters of the Pacific Ocean navigable by vessels of ten tons burden and upwards, within the jurisdiction of the United States and within about two miles from the island of San Clemente, an island in the Pacific Ocean within the limits of the State of California, in said southern district, and within the jurisdiction of this court, one Pedro Mannzen, and divers other persons unknown, were unlawfully concerned in the furnishing and fitting out of a certain steamship or vessel called the *Itata*, with intent that such vessel should be employed in the service of certain foreign people, viz, certain inhabitants of the Republic of Chili, there organized and banded together in large numbers and in great force, and in open armed hostilities and insurrection against the said Republic of Chili and the lawful government thereof, said insurgents being known as the Congressional party, to cruise and commit hostilities against the citizens and property of a foreign State, viz, the Republic of Chili, with which the United States then were and now are at peace, contrary to the form of the statute in such case made and provided; whereby by force of the statute in such case made and provided, the said steamship or vessel called the *Itata*, her tackle, apparel, and furniture have become and are forfeited to the uses in said statute provided.

And also for that theretofore, viz, on the 6th day of May, 1891, within the limits of the United States,

viz, at the port of San Diego, in the State of California, in said southern district, and within the jurisdiction of this court, one Pedro Mannzen, and divers other persons unknown, were unlawfully concerned in the fitting out and furnishing of a certain steamship or vessel called the *Itata*, with the intent that such vessel should be employed in the service of certain foreign people, viz, certain inhabitants of the Republic of Chile, then organized and banded together in large numbers and great force, and engaged in open armed hostilities and attempted revolution against the said Republic of Chile and the lawful government thereof, and known as the Congressional party, to cruise and commit hostilities against the citizens and property of a foreign state, viz, the Republic of Chile, with which Republic the United States then were and now are at peace, contrary to the form of the statute in such case made and provided, whereby, by force of the statute in such case made and provided, the said steamship *Itata*, her tackle, apparel, and furniture, have become and are forfeited to the uses in said statute prescribed.

Second. That thereafter, upon due monition and citation issued and proceedings had, appearances were entered and answers filed by divers persons laying claim to the said ship, her tackle and furniture, etc., and a trial had with the result that the libel was dismissed by the court.

Third. That upon the trial of said libel of information the court found the facts as follows:

In January of 1891 the steamship *Itata* was an ordinary merchant vessel. Early in that month she was captured in the harbor of Valparaiso, Chile, by the people then known as the Congressional party, and who were then engaged in an effort to overthrow the

then established and recognized government of Chile, of which Balmaceda was the head. The *Itata* was by the Congressional party put in command of one of its officers, and was used in their undertaking as a transport to convey troops, provisions, and munitions of war, and also as a hospital ship and one in which to confine prisoners. Four small cannon were also put upon her decks, and she carried a jack and pennant. Some time prior to the following April one Trumbull came to the United States as an agent of the Congressional party, and about the month of April went to the city of New York, and there bought from one of the large mercantile firms of that city dealing in such matters 5,000 rifles and 2,000,000 cartridges therefor, with the intention and for the purpose of sending them to the Congressional party in Chile for use in their effort to overthrow the Balmacedan government.

The sale and purchase of the arms and ammunition were made in the usual course of trade. Trumbull caused them to be shipped by rail to San Francisco, and engaged one Burt to accompany them, which he did. Arrangements had been made by Trumbull with his principals in Chile, by which they were to send a vessel to the United States to get the arms and ammunition, and convey them to Chile for the use of the Congressional party there. The *Itata* was dispatched by that party for that purpose, and was accompanied as far as Cape San Lucas by the *Esmeralda*, a war ship, then in the service of the Congressional party. Before leaving Chile the *Itata* discharged the four small cannon, with the ammunition therefor, that she had theretofore carried, but she retained one small brass gun, which she had always carried and used as a signal gun, and also eight or ten old muskets and one small iron cannon, for which there was

no ammunition. At one of the Chilean ports the *Itata* took on board some soldiers, with their arms, not exceeding twelve in number, but they were taken not to be used as soldiers, but for passing coal and as stokers.

At San Lucas the captain of the *Esmeralda* took command of the *Itata*, and the captain of the latter was left there in command of the *Esmeralda*. The *Itata* then proceeded to San Diego, really in command of the *Esmeralda's* captain but ostensibly in command of another, who represented to the customs officers at that port that she was an ordinary merchantman, and was bound to some port on the on the northern coast. Before coming into the port of San Diego, or into the waters of the United States, the *Itata* hauled down her jack and pennant, the brass and iron cannon were removed from her deck and stowed in her hold, as were also the arms of the soldiers she carried; and their uniforms, as well as those of the officers, were removed, and all appeared in civilians' dress. At that port she laid in stores of coal and provisions, all of which were bought in the open market, and some of which were marked *Esmeralda*.

Meanwhile Trumbull had chartered a schooner, called the *Robert and Minnie*, in San Francisco, to take the arms and ammunition from there to a point in this judicial district, then expected to be near the island of Catalina, where she could meet the *Itata*, and deliver them on board of her, to be conveyed to Chile for the purposes already stated. The schooner *Robert and Minnie* accordingly took on board the arms and ammunition at the port of San Francisco, and, in charge of Burt, proceeded to the neighborhood of Catalina Island, where she expected to meet the *Itata*. In the mean time the suspicion of some of

the officers of the United States that the neutrality laws were being violated was aroused, and the marshal of this district was directed by the Attorney-General to detain the *Itata*, if such was found to be the case; and, acting upon those and certain instructions from the district attorney of this judicial district, he went on board the ship at San Diego and put a keeper in charge of her, and then went in search of the *Robert and Minnie*, which he did not find in the waters of the United States.

Communication was, however, had between the *Itata* and the schooner, and a point near San Clemente Island was fixed upon as the place of meeting for the purpose of transferring the arms and ammunition from the schooner to the ship. Accordingly, the *Itata*, on the 6th day of May, 1891, without obtaining clearance papers, and against the protest of the person left on board and in charge of her by the marshal, weighed anchor and steamed out of the harbor of San Diego with him on board, to meet the *Robert and Minnie*, and receive the arms and ammunition. The marshal's keeper was, however, put ashore at Point Ballast before leaving the harbor. While steaming out of it one or both of the *Itata's* cannon were brought on deck and some of the soldiers appeared in uniform.

On the 9th of May the *Itata* and *Robert and Minnie* came together about a mile and a half southerly of San Clemente Island in this judicial district, and then the arms and ammunition in question were taken from the schooner and put on board the ship in original packages, and the latter at once left with them for Chile. On September 4, 1891, the Congressional party was recognized by the Government of the United States as the established and only Government of Chile. Prior to that time there had been no recognition of that party by this Government

other than that, on March 4, the Secretary of the Navy cabled Admiral McCann "to proceed to Valparaiso, and observe strict neutrality, and take no part in troubles further than to protect American interests."

On March 26 the Secretary of the Navy cabled Admiral Brown, who had superseded Admiral McCann, "to abstain from proceedings in the nature of assistance to either, that is, the Balmaceda or Congressional party; that the ships of the latter were not to be treated as piratical so long as they waged war only against the Balmaceda government." On April 25 Secretary of State Blaine cabled the American minister, "You can act as a mediator with Brazilian minister and French chargé d'affaires." On May 5 Minister Egan cabled this Government, "Government of Chile and revolutionists have accepted mediation of the United States, Brazil, and France most cordially; those of England and Germany declined."

On May 7 Acting Secretary of State Wharton acknowledged the dispatch of Minister Egan and "expressed hope that through combined efforts of the Governments in question the strife which has been going on in Chile may be speedily and happily terminated." On May 14 Acting Secretary of State Wharton cabled Minister Egan that, "French minister reports threats to shoot the insurgent envoys by Balmaceda," and directed that they should have ordinary treatment under flag of truce.

—which facts, for the purpose of this motion, are assumed to be the facts of said case.

Fourth. A decree was entered in accordance with the order dismissing such libel, from which decree an appeal was taken and perfected in behalf of the United States to

the United States Circuit Court of Appeals for the Ninth Circuit, for the October term A. D. 1892, thereof, where said case is yet pending and undetermined.

Fifth. It is held by the court below that the purchase of arms and munitions of war within the limits of the United States by an agent of insurgent or revolutionary forces against a State or people with whom the United States are at peace, and the delivery of such arms and munitions of war to a ship controlled, officered, and manned by such revolutionary forces, having cannon and soldiers on board, and sent to receive such arms and munitions of war within the limits of the United States, pursuant to arrangements between the insurgents and the purchasing agent, is not a violation of any law of the United States or of the duty of the United States towards the Government of Chili.

In behalf of the United States it is insisted that such acts constitute a violation of our municipal law, as well as of the law of nations, and subjects such vessels and tackle to forfeiture, and also the cases of arms found on board.

Sixth. It is at least impliedly held by the court below that the statutes of the United States have no application to insurgents or revolutionary forces engaged against a state or power with which the United States is at peace, unless the United States had recognized by some official act the existence of a state of war, and as a consequence the belligerent rights of both parties to the contest, or as stated by said court—

> A vessel in entering the service of the opposite faction * * * could hardly be said to enter the service of a foreign prince or state, or of a colony,

> district, or people, unless our Government had recognized * * * faction as at least constituting a belligerent, which it does not appear to have done. (R., 37.)

On behalf of the United States it is insisted that the fitting out or furnishing of any vessel to aid any number of persons to commit hostilities or armed violence against a nation or people with which the United States is at peace is such a violation of the laws of the United States, as also of the law of nations, as requires the seizure and the condemnation of said vessel.

And that the question whether these insurgents had such a political *status* as to bring them within the neutrality laws or not was not, and is not, a legal question in the first instance, but belongs to the executive branch of the Government, whose decisions the courts follow, and that upon the facts found the insurgents of Chili were at the time named not recognized by the executive department and were consequently without belligerent rights.

Seventh. Inasmuch as the determination of the said cause in the said court is final unless this court shall by proper order direct otherwise, and inasmuch as the issues involved are international in their character and of such dignity and importance that the peace of our people might depend upon the proper construction of the statutes under which these issues arise, it is respectfully submitted that the appeal should be heard in this court in the first instance and a final decision of the force, scope, and effect of said act obtained, as well as of its relations to the law of nations.

It is submitted that such course is more consistent with the policy of our Government from the earliest times, and

better calculated to promote harmony between this and others powers, than to leave questions upon which high authorities have heretofore differed to the perhaps varying decisions of the several Circuit Courts of Appeal.

And the United States files herewith and makes a part of the petition herein a full, true, and correct copy of the record as it was made in the district court of the United States for the southern district of California, together with the transcript and all proceedings as the same stands and remains in said United States Circuit Court of Appeals, Ninth Circuit.

Wherefore, petitioner prays that this honorable Court will take cognizance of the matters herein set forth and referred to, and will be pleased to require by writ of certiorari the said cause to be certified to it by the said United States Circuit Court of Appeals for the Ninth Circuit for its review and determination, pursuant to the provision of the statute, and that this Court will thereupon make such further order or decree as justice may require.

CHARLES H. ALDRICH,
Solicitor-General.

W. H. H. MILLER,
Attorney-General.

NOTE.—At the same time the libel herein referred to was filed and the proceedings had, a similar libel was filed against "2,000 cases of arms," etc. The court below, in its opinion (Rec., 44) treated these cases as one case, and we assume that they should be so treated here, as the determination of one is necessarily decisive of all the questions involved in the other.

O